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No. 1073

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In the Supreme Court

of the

United States

October Term 1966

LAURENCE COLBRESE, JR.,

Petitioner,

vs.

NATIONAL FARMERS UNION PROPERTY AND CASUALTY COMPANY,

Respondent.

Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

---

CALE CROWLEY
Billings, Montana
Attorney for Petitioner

Of Counsel:

CROWLEY, KILBOURNE, HAUGHEY, HANSON & GALLAGHER
Billings, Montana

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Petitioner prays that a Writ of Certiorari issue to review a judgment of the Ninth Circuit Court of Appeals which reversed a judgment of the District Court of the United States for the District of Montana, ordered a final judgment entered for respondent, and which in the opinion of petitioner is clearly in direct conflict with a prior controlling decision of the Montana Supreme Court.

OPINION BELOW

National Farmers Union Property and Casualty Company v. Laurence Colbrese, Jr., 9th C.C., 368 F.2d 405 (1966).

OPINIONS BELOW

The sole legal issue of applicable Montana law was decided by the District Court in denying a motion by respondent for summary judgment, the opinion being reported at *227 F. Supp. 978.* The subsequent findings of fact, conclusions of law, and opinion of the District Court granting judgment to petitioner are not reported *(Appendix A, 1-19).* The opinion of the Ninth Circuit court reversing is not yet reported *(Appendix A, pp. 20-35).*

JURISDICTION

The action was filed in the Montana United States District Court under *Title 28, U.S.C.A., Sec. 1332,* by reason of diversity of citizenship. Judgment of the District Court in favor of petitioner was entered September 7, 1965. Following denial of a petition for rehearing, judgment of the Ninth Circuit Court reversing and rendering final judgment against petitioner was entered December 13, 1966 *(Appendix A, p. 37).* Jurisdiction of this Court is invoked under *Title 28, U.S.C.A., Sec. 1254(1).*

QUESTIONS PRESENTED

A single legal issue is involved. A statute of the State of Montana governing transfer of ownership of a motor vehicle provided in part:

> "(d) Until said registrar shall have issued a certificate of registration and certificate of ownership and statement as hereinbefore provided, delivery of any motor vehicle shall be deemed not to have been

made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective for any purpose." *(53-109(d), R.C.M. 1947.)*

In *Safeco Ins. Co. v. Northwestern Mutual Ins. Co., 1963, 142 Mont. 155, 382 P.2d 174*, the Montana Supreme Court applied the foregoing section to govern the meaning of the terms "owned" and "non-owned" as used in liability insurance contracts covering motor vehicles. The controlling facts of *Safeco* are identical with this case, although the cases differ in many other respects.

United States District Judge W. J. Jameson, formerly a Montana practitioner, investigated to determine the basis of the decision of the Montana Supreme Court in *Safeco:*

a. "Admittedly the factual situation here is distinguishable in many respects. Accordingly, it becomes important to determine the basis of the court's decision in the Safeco case. In this connection I have examined the briefs of all parties, including one filed by amicus curiae, in the Safeco case." *(227 F. Supp. at 980-981.)*

* * *

b. "Here in effect counsel are asking this court to 'forecast' a modification of the interpretation of a Montana Statute and comparable insurance policy made by the Montana Supreme Court in Safeco. Under my interpretation of what the Montana Supreme Court held in Safeco, the abstention doctrine fortifies my conclusion that defendant's motion for summary judgment must be denied." *(227 F. Supp. at 983.)*

c. "I am still of the opinion that in the absence of any further construction of the Montana statute by the Montana Supreme Court Safeco is controlling."
(Appendix A, p. 19.)

The Ninth Circuit Court agreed that the particular vehicular transfer involved is governed and controlled by the requirements of *Section 53-109, R.C.M. 1947,* but held:

a. "We do not believe, however, that our foregoing conclusion is dispositive. As we read section 53-109(e), its only effect is that legal title to an automobile cannot pass to a voluntary transferee in the absence of compliance with the statutory procedure. Since there was no such compliance here, legal title did not, 'for any purpose,' pass to Albert Kinney. The crucial question is not the identity of the holder of the legal title but whether or not the car was 'non-owned' by Kinney as the term is employed in the insurance contract."
(Appendix A, pp. 27-28.)

b. "Appellee argues that, despite the fact that this court might be disposed to allow the controversy to turn on the meaning of the concept of ownership as it was employed by the parties to the insurance contracts in question, we are bound by the decision in Safeco Insurance Co. v. Northwestern Mutual Ins. Co., supra, to affirm. If Safeco had decided the very question involved in the instant case, we would, of course, be constrained to follow."
(Appendix A, p. 30.)

The very question was considered and decided by the Montana Supreme Court in *Safeco,* and the foregoing decision by the Ninth Circuit Court is in direct conflict.

Accordingly, the questions presented are:

1. Does the opinion of the Ninth Circuit Court in this case *(Appendix A, pp. 20-35)* contradict and con-

flict with the prior controlling decision of the Montana Supreme Court in *Safeco (142 Mont. 155, 382 P.2d 174)* and nullify the specific language of *Section 53-109(d), R.C.M. 1947?*

2. Did the Montana Supreme Court in *Safeco* decide the precise question of whether the meaning of the concept of ownership of a motor vehicle as it was employed by the parties in the insurance contracts in question was governed and controlled by the provisions of *Section 53-109, R.C.M. 1947?*

3. Is the opinion and judgment concerning the Montana law applicable rendered by District Judge W. J. Jameson, a former member of the Montana bar, so clearly wrong that it should be reversed on appeal?

STATUTE INVOLVED

The Montana statute involved is *53-109, R.C.M. 1947.* Its provisions are quoted and its history set forth by the Montana Supreme Court in the *Safeco* case *(142 Mont. 158 through 163; 382 P.2d at 176 through 178).* The pertinent provisions are likewise quoted in the opinion of the Ninth Circuit Court *(Appendix A, pp. 24-25).* Subparagraph (d) is quoted above under the subhead "Questions Presented."

STATEMENT

The impact of *Section 53-109, R.C.M. 1947,* and in particular subparagraph (d), on the meaning and intention of the terms "owned and non-owned" of motor ve-

hicles as used in liability insurance contracts was the sole issue involved in the Montana state court *Safeco* case. The conclusions of law by the Montana state trial court in that case were based upon the same controlling facts as the controlling facts in this case, and are the same conclusions of law upon which the opinion of the Ninth Circuit Court is based in this case. They were reversed by the Montana Supreme Court in *Safeco*. The arguments and California law urged upon the Montana Supreme Court by the respondent Northwestern Mutual in *Safeco* were the same as those advanced by the Ninth Circuit Court in its opinion in this case. They were all rejected by the Montana Supreme Court. On the same basic facts, the Montana Supreme Court reversed the conclusions of law now adopted by the Ninth Circuit Court, and considered and rejected the same California law and reasons now adopted by the Ninth Circuit Court. There is an irreconcilable conflict between the two cases.

a. *Controlling Facts Are Admitted and Undisputed.*

It is important to have in mind that the controlling facts are all admitted and undisputed. They are all carefully delineated in the original published opinion of the District Judge *(227 F. Supp. 978)*, and in his subsequent findings of fact and conclusions of law *(Appendix A, pp. 1-19)*.

b. *Facts of Safeco case.*

In the *Safeco* case, two policies were involved—one issued by Northwestern Mutual covered the operation of

motor vehicles "owned" by automobile dealer Bear Paw; one issued by *Safeco* covered the operation of motor vehicles "owned" by Dean. Bear Paw agreed to sell and Dean agreed to buy a Studebaker. The consideration was agreed upon. Dean traded in a Hillman car, and delivered it to Bear Paw which had the car on its lot for sale. Bear Paw in turn on May 10, 1960, delivered the Studebaker to Dean who thereafter had full possession and control. As far as the parties were concerned, the sale and transfer was completed. However, no Certificate of Title and Ownership of the Montana Registrar of Motor Vehicles was ever executed, assigned or delivered to Dean, and no new Certificate of Title and Ownership was ever applied for from the Montana Registrar of Motor Vehicles nor issued to Dean. In other words, it was undisputed that there was a failure to comply with the procedures for transfer of ownership required by *Section 53-109, R.C.M. 1947*. On May 11, 1960, Dean was involved in an accident. If Bear Paw was "owner" of the Studebaker, the Northwestern Mutual policy covered. If Dean was "owner" of the vehicle, the Safeco policy covered.

c. *Conclusions of Law By Montana Trial Court Reversed By Supreme Court.*

Reversal by the Montana Supreme Court in *Safeco* of the conclusions of law by the Montana trial court is significant. The trial court held (1) that there was a completed sale by Bear Paw to Dean under the general

law of sales; (2) that at the time of the accident Dean was the owner of the Studebaker; (3) that the Studebaker was not owned by Bear Paw as the word "owner" is used in the Northwestern policy; (4) that Dean was owner as the word "owner" is used in the Safeco policy; (5) that the Northwestern policy did not protect Dean, but that the Safeco policy did *(Appendix B, p. 40)*. The Ninth Circuit Court has made substantially the same holding in this case. Safeco apealed to the Montana Supreme Court from those conclusions of law by the trial court. The Montana Supreme Court reversed.

d. *Argument Submitted To and Rejected By Montana Supreme Court in Safeco Case.*

Pertinent portions of the appellate briefs procured and studied by District Judge W. J. Jameson are copied extensively in *(Appendix B, pp. 38-55)*.

Analysis of the following arguments from the appellate brief of Northwestern Mutual *(Appendix B, pp.43-45)* dramatically pinpoints the basis of the decision of the Montana Supreme Court in *Safeco* in its true perspective.

Both appellant Safeco and respondent Northwestern Mutual agreed in their appellate briefs that the basic issue was quite narrow:

a. "We think it will be agreed that the issue here is quite narrow: If Dean was the 'owner' of the Studebaker on May 11th the Safeco policy is responsible; if Bear Paw was the 'owner' then the Northwestern policy is responsible up to its limits, beyond which Safeco becomes responsible as the 'excess' insurer."

(Appel. Brief, page 6, Appendix B, p. 39.)

b. "At the time of the accident Dean owned a liability insurance policy issued by Safeco, and Bear Paw owned a lability insurance policy issued by Northwestern. If Dean was the 'owner' of the car on May 11th, the Safeco policy is responsible. If Bear Paw was the 'owner' on May 11th, Northwestern is responsible.

"The sole problem in the case is one of definition. What does the word 'owner' mean as used in two policies?"

(Resp. Brief, page 6, Appendix B, p. 45.)

Northwestern argued to the Montana Supreme Court: "The sole problem in the case is one of definition. What does the word 'owner' mean as used in the two policies?" *(Appendix B, p. 45.)* "What does the word 'owner' mean as used in the insurance policies written by the respective companies?" "Contracts of insurance are to be interpreted as other contracts and must be interpreted to give effect to the mutual intention of the parties" *(Appendix B, pp. 46-47). "Section 53-109(d), R.C.M. 1947, is a recording statute governing the record title as distinguished from ownership." "Section 53-133* defines ownership." *(Appendix B, p. 47.)* The meaning of the word "owner" was then discussed in the light of Northwestern's version of the "intention of the parties" when using the terms in the insurance contracts, and "practical considerations."

"Normally we would expect that the parties would intend a cut-off date governing the insurance company liability to be the date upon which the right to control the vehicle involved changed. The word "owner" therefore would, if interpreted in accord-

> ance with what the parties intended to be construed to include persons who, because of basic property rights, had a right of control and to exclude those who did not." *(Appendix B, pp. 47-48.)*

"The fact is that Dean drove the car as a matter of right under a claim of ownership." "Giving the word 'owner' a normal meaning, Dean has the insurance he bargained for." "As a practical matter the law gains nothing by the application of the unrealistic language of *Section 53-109(d)* to the interpretation of the word 'owner' as it appears in the policies under consideration." *(Appendix B, p. 48)* It was argued that Dean was the owner under the General Law of Sales, that "all parties are agreed it was intended that Dean was owner of the Studebaker" *(Appendix B, p. 49)*; that *Section 53-109(d)* is a registration law only and should not control the definition of ownership; that "a literal application of *Section 53-109(d)* is unrealistic" *(Appendix B, p. 49)*; that the statute was not intended to alter the basic law of torts or contracts, that:

> "It should be remembered here that if 53-109d is held to govern ownership, that it will govern it whole hog and that there is no place short of the actual issuance of the registration certificate at which the court can say that ownership has changed. Since the results which would follow such a holding are so utterly absurb and will result in such manifest injustices the court should not so hold unless compelled by the statute to do so. There is no such statutory compulsion."
>
> *(Appendix B, pp. 50-51.)*

It was urged that another section, *53-133(f), R.C.M. 1947*, does define and should control the meaning of the word "owner" as used in insurance contracts *(Appendix B, p. 51*: Note: A comparable California statute was cited and quoted in *Yoshida* relied upon by Ninth Circuit Court. Application of both the California statute and *53-133 (f) R.C.M.* to facts such as these was specifically rejected by the Montana Supreme Court in *Safeco* as pointed out hereafter in subparagraph (e). Northwestern further argued that a California statute the same as *Section 53-109* is a registration law *(Appendix B, p. 52)*:

> "For about two decades the California Courts have struggled with the problems which the Montana Court here faces. After some indecision the California Courts have held that 'ownership does change despite the registration law and that the omnibus clause of a vendor's insurance policy is not liable where there has been a failure to comply with the registration law.' Because of this long struggle and because the Callfornia Courts have reached results which do not ignore the realities, we believe the California cases to be persuasive.
>
> * * *
>
> "Ownership as distinguishable from title in California is not controlled by the registration law."
>
> *(Appendix B, p. 53.)*

After urging that the California court decisions were persuasive and discussing 13 different California decisions in some 14 printed pages, Northwestern concluded: "Clearly in California the counterpart of *Section 53-109(d)* does not govern the meaning of the word

'owner'; does not in a case such as this make the omnibus clause effective" *(Appendix B, pp. 53-54)*. (As discussed hereafter, the Ninth Circuit Court bases its opinion on *Yoshida,* and *Teixeira. Yoshida,* a California case decided by the Ninth Circuit Court, interprets and applies the same; identical principles of California law urged upon the Montana Supreme Court in *Safeco* by Northwestern Mutual, and considered by, but flatly rejected by, the Montana Supreme Court. *Teixeira* was a Hawaiian case. It simply cites and relies upon the *Yoshida* case.)

e. *Compare the Foregoing Conclusions of Law (c) and the Foregoing Argument (d) with the Decision of The Montana Supreme Court in Safeco.*

The Montana Supreme Court reversed the foregoing Conclusions of Law of the Montana Trial Court, and the language which it used in rejecting the foregoing arguments and California law advanced in brief by respondent Northwestern is most revealing. After reviewing the legislative history of *Section 53-109*, and quoting and referring to what is substantially the present *Section 53-109(d)* (quoted above under "Questions Presented"), the Montana Supreme Court said:

> "Here for the first time is a specific provision that any intended transfer not in compliance with the statute, is incomplete and invalid for any purpose and while certain minor amendments have been made in subsequent years it still remains substantially the same, and now appears as subdivision (d) of

Section 53-109, R.C.M. 1947, supra." *(142 Mont. at 162; 382 P.2d at 177.)*

Two prior Montana decisions were then discussed, following which the court said:

a. "The above cited decisions do not support the contention of the defendants that the motor vehicle statutes are merely recording statutes.

"Defendants lay great stress upon subdivision (d) of Section 53-109, denominating it a registration law.

"It is true that the motor vehicle code covers the registration of motor vehicles, but this is under sections 53-107, 53-108, 53-114 and 53-122, R.C.M. 1947, *and not under section 53-109 which deals with the transfer of ownership of the motor vehicle.*" (Emphasis supplied; *142 Mont. at 163; 382 P.2d at 178.*)

b. "While defendants assert great problems will arise if section 53-109 is interpreted to mean what it says, we fail to follow such reasoning. The statutory requirements are quite simple, * * *." *(142 Mont. at 163; 382 P.2d at 178.)*

c. "There is nothing unrealistic, technical or artificial about this simple procedure *for the transfer of ownership* of a motor vehicle. * * * If the transfer has not been made in compliance with the statute and the registrar by reason thereof *does not issue a new certificate of ownership*, clearly there was *no transfer of ownership* in its inception." (Emphasis supplied; *142 Mont. at 164; 382 P.2d at 178-179.)*

d. "We must adhere to the tenor of our former interpretations that the provisions of the motor vehicle code provide the exclusive method of accomplishing a valid sale and transfer of a motor vehicle.

"No attempt having been made by either Dean or Bear Paw to comply with section 53-109, supra,

we must hold there was never a completed sale and the judgment must be reversed." *(142 Mont. at 164-165; 382 P.2d at 179.)*

f. *Facts of This Case.*

What are the undisputed facts of this case? *227 F. Supp. 978; Appendix A, pp. 1-19.)* Ehart was register-owner of a 1949 Ford passenger automobile. The Montana registrar of motor vehicles had issued and delivered to Ehart the Certificate of Title and Ownership contemplated by *Section 53-109*. Ehart died in 1957 leaving McCormick as his sole heir. McCormick died, and his widow, who was his sole heir, agreed to sell the car to Albert Kinney. Albert Kinney paid over the money and took possession in 1958. He considered himself the owner and kept possession of the car until December 3, 1960, when his son Jerry had a fatal accident while driving the car. There was never any compliance with provisions of *Section 53-109*. Mrs. McCormick had delivered to Albert Kinney a "certificate of registration and tax receipt" issued by the County Treasurer when annual license fees and taxes are paid. Such is not a controlling fact. The controlling fact admitted and undisputed is that the Certificate of Title and Ownership required by *Section 53-109, R.C.M. 1947,* and issued by the Montana Registrar was never delivered to nor assigned to Kinney by Mrs. McCormick; that Kinney had never applied to the Montana Registrar for one; and that the Montana Registrar had never issued to Kinney the new Certifi-

cate of Title and Ownership required by *Section 53-109(d)*.

Prior to December 3, 1960, respondent had issued to Albert Kinney a family automobile liability policy. The only pertinent provisions were in the omnibus clause defining persons insured with respect to operation of a non-owned automobile, and the provisions of *Section 53-109* which are incorporated by law in the insurance contract. Those insured were:

"(b) with respect to a non-owned automobile,

* * *

"(2) any relative with respect to a private passenger automobile * * * not regularly furnished for the use of such relative; * * *.

"non-owned automobile means an automobile * * * not owned by the named insured or any relative, other than a temporary substitute automobile! * * *"

(Appendix B, p. 8)

Montana has long adhered to the basic rule expressed by this Court in *United States ex rel Von Hoffman v. Quincy, 4 Wall 535, 18 L. Ed. 403, 408,* that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms *(City of Philipsburg v. Porter, 121 Mont. 188 at 193; 190 P.2d 676 at 678)*. The insurance contract, including the language of *Section 53-109* as part of its contractual provisions, was in effect on December 3, 1960.

g. *The Same Factual and Legal Issue Involved in Safeco is Involved in This Case.*

The same simple issue is involved as was before the Montana Supreme Court in *Safeco*. If Albert Kinney was the "owner" of the 1949 Ford on December 3, 1960, there was no coverage. If Albert Kinney was not the "owner" of the Ford, there was coverage.

As indicated, District Judge Jameson procured and studied the appellate briefs submitted to the Montana Supreme Court in *Safeco*. Details of the facts were distinguishable in many respects, but the critical facts were and are the same, *First,* in each case there was an agreement to sell and purchase a motor vehicle, a payment of the consideration, a delivery of possession and control of the vehicle, and, as far as the parties were concerned, there was a completed sale. *Second,* there was a total failure to comply with the simple, specific, procedures required by *Section 53-109*. *Third*, an insurance company had issued a liability policy under which coverage depended upon whether the motor vehicle was non-owned by the intended purchaser. *Fourth*, in each case there was a contention that *Section 53-109* was nothing more than a registration statute affecting the transfer of "legal title" only. *Fifth*, in each case, there was a contention that it was the concept of ownership intended by the insurance company in the contract of insurance as commonly accepted and understood in everyday sale transactions which controlled, and not the provisions of *Section 53-109*.

h. *Ninth Circuit Court Opinion Directly Contradicts and Conflicts with the Montana Supreme Court Decision in Safeco.*

The Montana Supreme Court flatly rejected all arguments of Northwestern Mutual. It held in unambiguous language that *Section 53-109* is not merely a recording statute or registration law, but deals with the "transfer of ownership" of a motor vehicle; that the provision in the statute that "any intended transfer" of ownership is incomplete, invalid and ineffective "for any purpose" unless the statutory procedure has first been complied with is plain, simple, and specific; that the statute means what it says, and prescribes a simple procedure for the transfer of ownership; that any intended sale or transfer of ownership is void "from its inception" unless the statutory procedure has first been complied with; that compliance with the statute is the exclusive method for transferring ownership, and any intention of Northwestern Mutual to the contrary in its contract of insurance, any different concept of ownership as the word "owner" is used in the contract of insurance, is invalid and ineffective; that because of the failure of the parties to comply with the simple procedures prescribed by *53-109*, Bear Paw was the owner as the term "owner" was employed in the Northwestern Mutual contract of insurance, and Dean was a "non-owner"; and that the Northwestern Mutual contract of insurance covered the loss *(142 Mont. 155, 382 P.2d 174)*.

The Ninth Circuit Court concedes that the transfer from Mrs. McCormick to Albert Kinney was a voluntary transfer governed and controlled by *Section 53-109*. "Since it was not so made, *Section 53-109(d)* declares that 'said intended transfer shall be incomplete and not be valid or effective for any purpose.'" *(Appendix A, p. 27.)* It then proceeds, however, to disagree with the Montana Supreme Court holding in *Safeco* by stating:

> "As we read Section 53-109(e), its only effect is that legal title to an automobile cannot pass to a voluntary transferee in the absence of compliance with the statutory procedure. * * * The crucial question is not the identity of the holder of the legal title but whether or not the car was "non-owned" by Kinney as the term is employed in the insurance contract."
>
> *(Appendix A, p. 28.)*

This is precisely the same conclusion of law found by the Montana lower court in *Safeco (Appendix B, p. 40)* reversed by the Supreme Court, and the same argument of respondent Northwestern Mutual to the Montana Supreme Court on appeal partially quoted above *(Appendix B, pp. 43-55)*, rejected and refused and reversed by the Montana Supreme Court. The Ninth Circuit Court then cites, quotes and relies upon two of its prior decisions —*Matsuo Yoshida v. Liberty Mutual Insurance Co., 9th C.C., 1957, 240 F. 2d 824,* and *Teixeira v. Globe Indemnity Co., 9th C.C., 1965, 349 F. 2d 502 (Appendix A, pp. 28-31).* The *Yoshida* opinion was written by Cir-

cuit Judge Barnes, one of the three Judges who sat on this case. California law was involved. The vehicle was in the possession of a conditional vendee. The California statute defined as an "owner";

> "the person entitled to the possession of a vehicle as the purchaser under a conditional sales contract."

This statute of California is substantially the same statute as *53-133(f), R.C.M. 1947*, urged upon the Montana Supreme Court in *Safeco* by Northwestern Mutual *(Appendix B, pp. 51-52)*. The Montana section reads:

> "f. The term 'owner' shall include any person, firm, association or corporation owning or renting a motor vehicle, or having the exclusive use thereof, under lease or other wise, and shall also include a contract vendee." *Section 53-133(f), R.C.M. 1947.)*

The Montana Supreme Court rejected the argument:

> "As to section 53-133, R.C.M. 1947, the statute defining words and phrases in the motor vehicle code, it clearly states what their construction shall be 'unless the context may otherwise require'. If there exists any conflict, which we do not perceive, in our view the context of section 53-109 requires the interpretation as herein stated."

The *Yoshida* opinion cites and applies another California statute, and a prior decision interpreting California law to the effect that the statutory definition of "owner" was not necessarily controlling, that the words of the contract of insurance were to be taken in their ordinary and popular sense. Is it not significant that the Montana Supreme Court in *Safeco* heard and rejected the same argument from Northwestern Mutual,

and heard and rejected the applicability in Montana of the California statutes and cases *(Appendix B, pp. 46-54)*? We recognize that the Ninth Circuit Court is constrained to follow the dictates of *Yoshida* in California while applying California law. *Yoshida* does not, however, express the law applicable in Montana.

Teixeira is an opinion by Circuit Judge Jertberg, another of the three judges who sat on this case. He was construing Hawaiian law. He cited and relied upon the *Yoshida* decision. Again we point out that *Yoshida* is good law in California, and *Teixeira* is good law in Hawaii, but their holdings have been rejected by the Supreme Court of Montana, and they do not express Montana law.

The Ninth Circuit Court places undue emphasis on the fact that in *Safeco* the intended sale had been completed for only one day, whereas Kinney's was for two years *(Appendix A, p. 30)*. Such is an artificial and inconsequential distinction. Important in each case is the fact that the parties had in fact completely consummated their sale transaction as far as they were concerned, and not the length of time for which it had been consummated. It was the effect of *Section 53-109(d)* on the completed and consummated transaction with which the Montana Supreme Court was concerned, and not upon the length of time which had elapsed thereafter. The Montana Supreme Court held that "if the transfer has not been made in compliance with the statute, and

the registrar by reason thereof does not issue a new certificate of ownership, clearly there was no transfer of ownership *in its inception.*" The Ninth Circuit Court also talks about the design and intention of a garage owner's liability policy; the coverage expectations of the parties; the actuarially determined premiums for risks involved, and the like *(Appendix A, pp. 32)*. There was and is no evidence in this record warranting such discussion. In addition, the Court said that to hold Albert Kinney was not the owner of the Ford within the meaning of the policies in suit would do violence to the intention of the parties and to traditional legal concepts of ownership *(Appendix A, pp. 35)*, both of which reasons were argued to *(Appendix B, pp. 46-52)*, and rejected by the Montana Supreme Court which then held in *Safeco* that the specific language of *Section 53-109(d)* is controlling *(142 Mont. 155, 382 P.2d 174)*. Finally, the Ninth Circuit Court said that to so hold would do violence to "our own sense of right and wrong" *(Appendix A, pp. 35)*, a reason utterly beside the point as long as the state Supreme Court has already spoken. In any event, all such discussion is wholly immaterial. Important is the plain and obvious conclusion that the five basic controlling facts in the *Safeco* case are identical with those in this case; that the conclusions of law by the Ninth Circuit Court in this case are the same as those reached by the Montana lower court in *Safeco*, and which were reversed by the Montana Supreme Court;

that the California law relied upon and applied here by the Ninth Circuit Court is the same as the California law which was argued to and rejected by the Montana Supreme Court; and that the reasons advanced by the Ninth Circuit Court for its holding were rejected by and are in direct conflict with the holding and result reached by the Montana Supreme Court. The opinion of the Ninth Circuit Court in this case is diametrically contradictory to that which was considered and decided and held by the Montana Supreme Court on the same controlling facts in the *Safeco* case.

REASONS FOR GRANTING THE WRIT

1. It is plain and obvious that the opinion of the Ninth Circuit Court in this case is a flagrant violation of the principles of law enunciated by this Court in

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the particular state involved whether declared by its legislature in a statute, or by its highest court in a decision. In this case the law applicable and controlling is expressed both in a Montana statute and in a controlling decision of the Montana Supreme Court. In holding directly to the contrary the opinion of the Ninth Circuit Court in this case is an obvious, clean cut volation of the principles of law first enunciated by this Court in the *Erie* case, and adhered to at all times since.

2. In creating a situation in which a trial on the same basic and controlling facts would require one result if tried in a Montana state court, and a directly opposite result if tried in a Montana federal court, the opinion of the Ninth Circuit Court in this case is a violation of the principles of law enunciated by this Court in

Guaranty Trust Co. of New York v. York, 326 U.S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464.

In all cases where the federal court exercises jurisdiction solely because of diversity of citizenship, the outcome of litigation in the federal court should be substantially the same as it would be if tried in the state court, so far as legal rules determine the outcome.

3. It is the duty of the federal court to ascertain and apply the state law in accordance with the controlling decision of the highest state court.

Huddleston, v. Dwyer, 322 U.S. 232, 88 L. Ed. 1246, 64 S. Ct. 1015.

4. A federal court is not warranted in refusing to ascertain the basis of the existing state ruling, and in refusing to follow it, on the conjecture that the Supreme Court of the State may modify it, or even set it aside, in the future.

Meredith v. City of Winter Haven, 320 U.S. 228, 88 L. Ed. 9, 64 S. Ct. 7.

5. When the District Judge who initially decides the issue has practiced law in the forum involved, and

is versed in the local law, and when he has investigated and carefully studied the local law applicable, his considered judgment should not be reversed on appeal unless it is clearly wrong.

Bernhardt v. Polygraphic Company of America, 350 U.S. 198, 100 L. Ed. 199, 76 S. Ct. 273;

Bellon v. Heinzig, Mont., 9th C.C., 347 F. 2d 4.

6. The sale, financing, repair and maintenance, and governmental control of operation, of motor vehicles, is of vast importance in the everyday life of Montana's citizens and business interests. Any legal confusion with respect to the intent, meaning, and application of *Section 53-109, R.C.M. 1947*, to ownership of motor vehicles has a general public impact far greater than the impact on this particular plaintiff in this particular case. Following the *Safeco* decision by the Montana Supreme Court, Montana lawyers had an unambiguous guide by which to advise clients with respect to the specific identity of the owner of a motor vehicle in each and every case. There was no uncertainty, no variance from case to case. Now, however, under this conflicting decision of the Ninth Circuit Court, there is no specific guide line. It varies from case to case depending upon the vagaries of undisclosed intentions. It is completely up in the air, uncertain, and indefinite. The opinion affects, of course, all insurance contracts, performance

bonds, and indemnity bonds whether for material damage or liability. Its ramifications are even greater, however. It extends to and affects all other controversies where determination of motor vehicle ownership is involved — liens, attachments, third party claims after attachment, claim and delivery actions, finance contracts, transfers by operation of law, ownership under Montana's Safety Responsibility Act, impoundment or confiscation or installation of safety equipment by order of a public official, and the like.

Equally distressing will be the struggle behind the scenes shopping for the favorable decisional forum — the federal court in one case, the state court in another.

We respectfully submit that the legal confusion caused by such an obvious conflict between the opinion of the Ninth Circuit Court and the *Safeco* decision of the Montana Supreme Court qualifies this case for consideration under the limitations expressed in Rule 19, Supreme Court Rules.

7. Could the three Ninth Circuit Judges (none of whom were Montana practitioners) have been subconsciously biased by a prior indoctrination with the principles of California law which they applied in reversing a Montana District Judge applying Montana law in a Montana case? The present opinion of the Ninth Circuit was written by Circuit Judge Ely Joined by Circuit Judges Barnes and Jertberg. It is based entirely on the

prior *Yoshida* and *Teixeira* decisions by the same court.

The *Yoshida* opinion was written by Circuit Judge Barnes. It was a California case, and he was construing and applying principles of California law. He necessarily became indoctrinated in the soundness of those California principles before he could write the *Yoshida* opinion. As indicated above, there can be no doubt that it is the same California law that was urged upon, considered, and rejected by the Montana Supreme Court in *Safeco*.

The *Teixeira* case involved Hawaiian law. The opinion was written by Circuit Judge Jertberg. It simply accepted, adopted, and applied the principles of California law applied in *Yoshida*. Once again we note that to arrive at that conclusion, Circuit Judge Jertberg necessarily became indoctrinated with the applicability of the principles of California law, all of which, however, were rejected in Montana by the Montana Supreme Court in *Safeco*.

In our research, we have read with great interest the decision of the California Supreme Court in Banc, *Stoddart v. Pierce, 1959, 346 P.2d 774*. The case involved California statutory personal injury liability of "every owner of a motor vehicle" merely because of ownership without regard to vicarious liability under respondeat superior. Montana has no such statute. The decision refers to section 186 of the California code identical with *53-109(d), R.C.M. 1947*, and states in part:

> "Insofar as the legal title of the party failing to comply with the statutory requirement, or his liability to a third person is concerned there is little doubt that the quoted language means just what it says. But this does not mean that no equitable title passes from a defaulting transferee, or that as to either of them the transfer is entirely ineffective. Such an interpretation would defeat the primary purpose of the statute and relieve a defaulting transferee of liability to a person injured in an accident involving the vehicle which he has failed to register." *(P. 789.)*

Note the similarity of this legal conclusion to the legal conclusion of the Ninth Circuit Court in the opinion in this case written by Circuit Judge Ely. The law firm of which Circuit Judge Ely was then a member participated as successful amicus curiae in that case. From that experience Circuit Judge Ely must have been indoctrinated with the principles of California law there enunciated, all rejected in 1963 by the Montana Supreme Court in *Safeco.*

The possibility that these Ninth Circuit Judges were subconsciously influenced by their prior indoctrination with the principles of Californa law which they have now applied in this Montana case cannot be ignored. It seems plain and obvious to petitioner that the same, identical principles of California law were urged upon, considered, and rejected by the Montana Supreme Court in *Safeco.* We submit that the bare possibility of an unconscious bias in favor of California law compels this Court under its Rule 19 to accept this petition and examine the basis of the *Safeco* decision.

CONCLUSION

The facts are admitted and undisputed. The issue, we believe is clear: Is the present opinion of the Ninth Circuit Court in conflict with what was urged, considered, and decided by the Montana Supreme Court in *Safeco*; does the opinion of the Ninth Circuit Court negate the plain and unambiguous language of *Section 53-109 (d), R.C.M. 1947*, as interpreted by the Montana Supreme Court in *Safeco*? The answer, we believe, is equally clear: there is an irreconcilable conflict between the two decisions. The importance of not having two conflicting decisions with respect to the application of Montana law arising out of the same controlling facts — one by the Montana Supreme Court, and the other by the Ninth Circuit Court of Appeals — is apparent. The importance of forestalling and correcting such an obvious violation of the principles of *Erie-Tompkins* is equally apparent. We respectfully submit that in view of the importance and simplicity of the only question presented, the lack of any doubt as to the basis, purpose and intent of the decision of the Montana Supreme Court, and the urgency of an early decision in order to avoid the embarrasing effects of such two contradictory decisions, the petition for a writ of certiorari should be granted, and the judgment of the Ninth Circuit Court of Appeals should forthwith be reversed, with instructions for such further proceedings as may be necessary

to make the judgment of the Ninth Circuit Court consistent with the interpretation of the Montana state statute by the Montana Supreme Court as enunciated in the findings of fact and conclusions of law of District Judge W. J. Jameson. If, however, this petition should be granted but the court should determine that oral argument or other further proceedings should be required in this court, then it is requested that the cause be placed on the summary docket and advanced for argument during the present term, and that in the interest of the earliest possible hearing that this petition be accepted as the brief of petitioner on the merits.

Respectfully submitted,

CALE CROWLEY
P. O. Box 2529
Billings, Montana 59103
Attorney for Petitioner

OF COUNSEL:

CROWLEY, KILBOURNE, HAUGHEY,
HANSON & GALLAGHER
Billings, Montana

January, 1967

APPENDIX A

Opinions Below

Civil No. 438

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF MONTANA
BILLINGS DIVISION

LAURENCE COLBRESE, JR.,
Plaintiff

vs.

NATIONAL FARMERS UNION PROPERTY
AND CASUALTY COMPANY,
Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on regularly before the court, sitting without a jury, on March 18, 1965, the court having theretofore submitted a special interrogatory for the decision of a jury on December 21, 1964; and the respective parties having both adduced evidence in support of their respective claims and defenses hereunder, and each having submitted requested findings of fact and conclusions of law and memoranda in support thereof, and the court being fully advised in the premises, does hereby make and find the following:

FINDINGS OF FACT

I.

Defendant is a capital stock corporation, organized under the laws of the State of Utah, with its principal offices and place of business in Denver, Colorado, duly authorized to transact the business of insurance in the State of Montana at all times mentioned herein. Plaintiff is a citizen of the State of Montana. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

II.

Duaine Colbrese, deceased, was 16 years of age at the time of his death on December 3, 1960. Plaintiff is the father of Duaine Colbrese, deceased.

III.

On December 3, 1960, at about 8:00 o'clock A.M., Duaine Colbrese was riding as a passenger in a 1949 Ford two-door sedan, motor and serial No. 69672, driven by Jerry Kinney, minor son of Albert Kinney, upon and along U.S. Highway #10, a public highway running generally in an east-west direction across the State of Montana. At a point approximately one mile east of the town of Reed Point, Montana, Jerry Kinney operated, managed and controlled the automobile in such a manner that it skidded on ice, left the highway, upset and thereby caused injuries to the person of Duaine Colbrese which resulted in his death.

IV.

The 1949 Ford automobile was acquired by Albert Kinney when he purchased a farm and the machinery and equipment thereon from a Mrs. Robert McCormick prior to September 2, 1958. The record owner of the farm and the Ford was C. W. Ehart, who died prior to September 2, 1958, leaving as his sole heir, Robert McCormick. Upon Ehart's death, McCormick became entitled to all of Ehart's right, title and interest in the Ford. McCormick died, leaving as his sole heir, Mrs. Robert McCormick, who thereupon became entitled to McCormick's right, title, and interest in the Ford.

V.

Prior to September 2, 1958, Mrs. McCormick agreed to sell all of her right, title and interest in the Ford to Albert Kinney for a consideration, which has been fully paid. Since September 2, 1958, Kinney has been in possession of the Ford and has claimed to be its owner.

Albert Kinney received the "certificate of registration and tax receipt" from Mrs. McCormick and paid for Montana licenses for the automobile for the years 1959 and 1960.

The "certificate of ownership" issued by the Registrar of Motor Vehicles of the State of Montana covering the Ford has not been delivered to Kinney by Mrs. McCormick, or anyone representing her, or by the Regis-

trar of Motor Vehicles. On four or five occasions between September 2, 1958, and December 3, 1960, Kinney requested the attorney for Mrs. McCormick and the Ehart estate to furnish to him the title certificate (certificate of ownership) issued by the Registrar of Motor Vehicles relating to the Ford.

VI.

On or prior to December 3, 1960, Albert Kinney was the owner of a certain 1951 Dodge automobile, having motor and serial No. 02755. On September 7, 1960, Albert Kinney obtained from the defendant a policy of insurance, bearing Policy No. A24-107,394, which provided $50,000/100,000 bodily injury liability coverage, $5,000 property damage coverage, and $2,000 medical payments coverage.

VII.

On and prior to December 3, 1960, Albert Kinney was also the owner of a certain 1954 International 1½ ton truck motor vehicle, having motor and serial No. 20950. Upon written application from Albert Kinney, executed April 14, 1954, defendant made, issued and delivered to Albert Kinney a policy of insurance bearing No. A24-030,461, which provided $25,000/50,000 bodily injury liability coverage, $5,000 property damage coverage, and $1,000 medical payments coverage.

VIII.

On May 26, 1961, the plaintiff, Laurence Colbrese, Jr., filed an action in the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, as Cause No. 38051, in which Laurence Colbrese, Jr., was plaintiff, and Jerry Kinney was named as defendant. In the complaint the plaintiff, as the father of Duaine Colbrese, prayed for judgment and damages in the total sum of $40,850,00, including as special damages, the sum of $850.00 as casket, funeral and cemetery expenses.

IX.

Subsequently, Albert Kinney, as father of Jerry Kinney, made written demand upon defendant, National Farmers Union Property & Casualty Company, that it appear and defend said action on behalf of Jerry Kinney. The defendant declined to accept the defense of the action, or to admit coverage under any of its policies theretofore issued to Albert Kinney.

X.

Subsequently a change of venue was granted in Cause No. 38051, and the action was transferred to the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Stillwater, as Cause No. 3650. In that court, Jerry Kinney, by and through his duly appointed Guardian ad litem, Albert Kinney, filed his written offer to allow judgment to be taken against him in the sum of $18,850.00. Thereafter,

Laurence Colbrese, Jr., filed his written acceptance of the offer and, on October 16, 1962, judgment against Jerry Kinney was entered in the sum of $18,850.00, with costs in the sum of $12.88, making a total judgment of $18,-862.00. Although the judgment does not recite that any investigation or inquiry was made by the judge to determine if entry thereof was for the best interests of the minor defendant, there is also nothing in the proof submitted in this action which would establish that no such investigation or inquiry was undertaken. Jerry Kinney was legally obligated to pay the amount of that judgment to the plaintiff in this action, Laurence Colbrese, Jr.

XI.

After the entry of judgment, Jerry Kinney, through his counsel, made written demand upon defendant, National Farmers Union Property & Casualty Company, for payment of the judgment and attorney's fees incurred in the amount of $750.00. The defendant company again declined to accept liability under any of its policies of insurance.

XII.

On June 7, 1963, Albert Kinney was appointed by the District Court of the Thirteenth Judicial District, in and for the County of Yellowstone, as guardian of Jerry Kinney, and Letters of Guardianship were issued to Al-

bert Kinney on June 7, 1963, under file No. 13145 of that court. On June 7, 1963, Albert Kinney petitioned the aforesaid court for an order authorizing him to execute for his ward an assignment of Jerry Kinney's right to sue for and collect indemnity from National Farmers Union Property & Casualty Company in the amount of the judgment entered against him in Civil Action #3650, Stillwater County, Montana, plus attorneys' fees amounting to $750.00, in consideration of the satisfaction of the judgment. On June 7, 1963, an order was entered by the district judge of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, in file No. 13145, authorizing Albert Kinney, guardian of Jerry Kinney, to execute an assignment of all rights to sue for and collect indemnity from defendant herein, in consideration of the satisfaction of the judgment entered against Jerry Kinney, in Civil Action #3650, Stillwater County, Montana. An assignment was executed in pursuance to the order on June 12, 1963, and on the 20th day of June, 1963, an acknowledgment of satisfaction of the judgment was filed in the office of the Clerk of Court of Stillwater County, Montana, and satisfaction of judgment entered.

XIII.

Each of the above mentioned insurance policies required the defendant to pay on behalf of the insured all sums which the insured should become legally obligated to pay as damages because of:

"A. Bodily injury, sickness or disease, including death resulting therefrom, hereinafter called bodily injury, sustained by any person * * *

Arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile * * *, and the company shall defend any suit alleging such bodily injury or property damage * * *."

Other policy provisions which are pertinent are as follows:

"The following are insureds under (liability):

(a) With respect to the owned automobile,

(1) The named insured and any resident of the same household.

(2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured;

(b) With respect to a non-owned automobile,

(1) the named insured,

(2) any relative, but only with respect to a private passenger automobile or trailer not regularly furnished for the use of such relative; * * *

"'Non-owned automobile' means an automobile or trailer not owned by the named insured or any relative, other than a temporary substitute automobile;"

XIV.

The 1949 Ford was not "regularly furnished" for the use of Jerry Kinney.

XV.

On September 2, 1958, upon the written application of Albert Kinney, the defendant issued its policy of in-

surance numbered A24-157-138 covering the 1949 Ford, with Albert Kinney as the named insured, providing bodily injury liability of $10,000/20,000 coverage, $5,000 property damage liability coverage, and $500.00 medical payment coverage arising out of the use, operation and maintenance of the 1949 Ford. Albert Kinney paid the defendant the insurance premiums due upon this policy of insurance for the years 1958 and 1959, but he allowed the policy to lapse for non-payment of premium on September 2, 1960. The said policy was lapsed and not in effect on the date of death of the minor, Duaine Colbrese, on December 3, 1960.

XVI.

Defendant's form application for insurance on the 1949 Ford contains a paragraph #7 as follows:

> "With the exception of any encumbrance stated, the named insured is the sole owner of the vehicle unless otherwise stated herein:"

Nothing is written in the blank following such paragraph. However, defendant's agent, Dwight Harris, filled out the application form himself, and was informed, before the application was signed by Albert Kinney, that no ownership certificate (title) had been received by Albert Kinney from the attorney for C. W. Ehart's estate. Dwight Harris at no time pertinent to this case, inquired of Albert Kinney as to whether Kinney had any non-owned vehicles in his possession or use, and at no time pertinent to this case did Albert Kinney rep-

resent to defendant that he was the sole owner of the 1949 Ford.

WHEREFORE, in consideration of the foregoing findings of fact and the court being advised in the premises, hereby makes and adopts the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction of this cause by reason of the diversity of citizenship of the parties and because the amount in controversy exceeds $10,000.00, exclusive of interest and costs.

2. The 1949 Ford automobile in which plaintiff's son was killed was, on December 3, 1960, a "non-owned automobile" under defendant's insurance policies referred to in Paragraphs VI and VII of the findings of fact, and was not regularly furnished for the use of Jerry Kinney by his relative, Albert Kinney.

3. Jerry Kinney was entitled to representation and defense of the lawsuit and claim made against him by Laurence Colbrese, Jr., in the state court action, and by refusing to do so defend and represent Jerry Kinney, defendant breached the insurance contracts mentioned in Paragraphs VI and VII of the findings of fact.

4. The judgment entered by compromise in the state court action was not void and is not subject to collateral attack by defendant. Pursuant to said judgment, Jerry Kinney was legally obligated to pay plaintiff herein the amount of $18,862.88, plus interest from the date of entry thereof, to-wit: October 16, 1962.

5. By virtue of defendant's breach of its insurance contract with its insured, Jerry Kinney, Kinney was entitled to claim the amount of the judgment, as aforesaid, plus interest thereon, from defendant, which said claim was assigned and is now owned by the plaintiff Laurence Colbrese, Jr.

6. Neither Albert Kinney, Jerry Kinney nor plaintiff are estopped from claiming as against defendant, or from asserting, that the 1949 Ford was a non-owned automobile under defendant's policies, nor have any of them waived their rights to do so.

7. Plaintiff is entitled to recover from defendant the $850.00 item of special damages representing casket, funeral and cemetery expenses even though plaintiff has sought to recover these same damages under the "Medical Payments" provisions of the aforementioned insurance policies in a separate state court action against defendant.

8. That plaintiff is entitled to judgment in the amount of $18,862.88, plus interest from October 16, 1962.

DISCUSSION

Following a pretrial conference on January 10, 1964, the defendant filed a motion for summary judgment on the ground that under the undisputed facts and as a matter of law, the 1949 Ford automobile was not

a "non-owned automobile" within the meaning of the policies issued by the defendant, but rather was a vehicle owned by Albert Kinney, the named insured. The motion for summary judgment was denied in a memorandum opinion filed April 1, 1964, and reported at 227 F. Supp. 978. Relying upon the interpretation of Section 53-109(d) R.C.M. 1947,[1] by the Supreme Court of Montana in Safeco Insurance Co. v. Northwestern Mutual Ins. Co., 1963, 142 Mont. 155, 382 P.2d 174, it was held that the title of the Ford automobile had not passed to Albert Kinney and that the Ford was a non-owned automobile within the meaning of the policies issued by the defendant.

Thereafter, on December 21, 1964, the issue of whether the Ford automobile was "regularly furnished for the use of Jerry Kinney, prior to and including December 3, 1960" was tried before a jury, sitting in an advisory capacity. The jury found that the vehicle was not regularly furnished for the use of Jerry Kinney. The evidence amply supported this finding, and it is adopted by the court.

Defendant's brief in support of its motion for summary judgment sets forth that the purpose of the motion was to test the applicability of section 53-109(d)

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1 Subsection (d) provides:

"(d) Until said registrar shall have issued a certificate of registration and certificate of ownership and statement as hereinbefore provided, delivery of any motor vehicle shall be deemed not to have been made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective for any purpose."

under the facts of this case. In its memorandum in support of its proposed findings of fact and conclusions of law, defendant takes the position that section 53-109(d) does not and cannot apply if the person named in the certificate is deceased, and that the transfer was in effect one by operation of law, which is governed by section 53-109(e).

Section 53-109(e) prescribes the procedure to be followed by an executor, administrator, and others acting in a representative capacity, and their successors in interest, "(i)n the event of a transfer by operation of law of any title or interest of an owner of the legal title or owner in and to a motor vehicle registered under the provisions of this act, as upon inheritance, devise or bequest * * *" [2]

It is apparent that subsection (e) applies only to

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2 Subsection (e) provides in pertinent part:

"(e) In the event of a transfer by operation of law of any title * * * in and to a motor vehicle registered under the provision of this act, as upon inheritance, devise or bequest, * * * the executor, administrator, * * * or successor in interest of the person whose title or interest is so transferred shall forward to the registrar of motor vehicles an application for registration in the form required for an original application for registration, together with a verified or certified statement of the transfer of such title or interest which statement shall set forth the reason for such involuntary transfer, the title or interest so transferred, the name or names of the person or persons to whom such title is to be transferred, the process of procedure effecting such transfer and such other information as may be requested by the registrar and with such statement shall be furnished such evidence and instruments as may otherwise be required by law to effect a transfer of legal or equitable title to or an interest in chattels as may be required in such cases, and in the event the registrar shall be satisfied that such transfer is regular and that all formalities as required by law have been complied with, he shall cause to be sent to the owner, conditional sales vendors, lessors, mortgagees and other lienors, as shown by his records notice of such intended transfer and thereafter, but not less than five (5) days thereafter, shall register such motor vehicle and shall issue a new certificate of ownership and certificate of registration to the person or persons entitled thereto * * *."

transfers "by operation of law." The statement of transfer must set forth, inter alia, the reason for the "involuntary transfer." Kinney did not acquire his interest in the Ford automobile by reason of any transfer by operation of law, but through a *voluntary* transfer from Mrs. McCormick. Obviously, the administrator of the estate and Mrs. McCormick should have taken proper steps under subsection (e) to obtain a certificate of ownership. The transfer from Mrs. McCormick to Kinney, however, was a voluntary transfer governed by subsections (a), (b) and (d) of section 53-109.

Defendant next contends that even though Albert Kinney was not the record owner of the Ford automobile, he and plaintiff have either waived or are estopped from asserting the right to deny Kinney's ownership of the car. This defense is premised upon the contention that by making the written application for insurance on the Ford and continuing the policy in effect for two years Albert Kinney induced and led the defendant to believe he was the owner. This defense fails for several reasons.

First, none of the testimony indicates that Albert Kinney ever contended that he had received a certificate of title for the Ford. In fact, in the findings of fact, supra, it was noted that the defendant's agent who filled out the application was clearly apprised that Kinney did not have the title.[3] This knowledge of the defendant's

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3 The agent testified in pertinent part:

"Q. Mr. Harris, you knew at the time you filled out this application that the title to the 1949 Ford was not registered in the name of Albert Kinney, did you not?

A. Yes, I did. Albert told me that.

Q. And you were never informed at any time that it was registered in his name, were you?

A. No."

agent under Montana law applicable at all times pertinent to this case was imputed to the defendant and it was bound thereby.[4] In Curtis v. Zurich General Accident & Liability Insurance Co., 1939, 108 Mont. 275, 280; 89 P.2d 1038, the Montana court, quoting from an earlier Montana case, Webber v. Mass. Bonding & Ins. Co., 1928, 81 Mont. 351, 359, 263 Pac. 101, 104, stated the rule on this point:

> "It is well settled that, where the agent of an insurance company, who fills out the application for insurance, is duly informed as to facts and fails to state them in the application, the actual knowledge of the agent will be held to be the knowledge of the company."

See also Fireman's Ins. Co. of Newark, N.J., v. Show, D. Mont. 1953, 110 F.Supp. 523, 527.

The imputation of Harris's knowledge of the status of the title to the defendant likewise prevents the defendant from asserting the defense of estoppel. Estoppel is defined in the Montana Codes as follows:

> "3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it. (R.C.M. 1947, section 93-1301-6)."

This code section has been construed as a statutory declaration of the doctrine of equitable estoppel. Hustad

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4. In 1959 the Montana Legislative Assembly enacted a comprehensive Insurance Code (R.C.M. 1947, sections 40-2601 to 40-5359) and repealed many of the formerly applicable laws. However, this new Code did not become effective until January 1, 1961, and its provisions are not material to the determination of this case. See R.C.M. 1947, Section 40-2615, and Laws of Montana 1959, Ch. 286, §19.

v. Reed, 1958, 133 Mont. 211, 222; 321 P.2d 1083 and cases there cited. The Hustad case, at 133 Mont. 223, outlined the elements necessary to an equitable estoppel, the first of which is: "1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts." In the instant case there was no representation or concealment of material facts since the fact claimed to have been concealed, the status of the title to the Ford, was known to the defendant through its agent.

Nor may the defendant rely upon a "waiver" of plaintiff's right to deny that Kinney owned the car. In Northwestern Fire & Marine Insurance Co. v. Pollard, 1925, 74 Mont. 142, 148, 238 Pac. 594, the court described a waiver in this language:

> "Waiver is the voluntary abandonment or surrender by a capable person, of a right known to him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefits. . . .
>
> "Waiver must be manifested in some unequivocal manner and . . . it must in all cases be intentional. . . . An intention to make the waiver claimed should clearly be made to appear by the evidence. . . ."

In this case not only is it not "clearly made to appear from the evidence" that Kinney intended to waive the right to assert his non-ownership of the Ford, but also there is a complete lack of any evidence that Kinney committed any act or acts which directly or indirectly constituted such a waiver. At no time did he ever maintain

that the title to the Ford was other than the evidence has shown it to have been, that is, that the record title was not in Kinney but rather was tied up in the estates of E. C. Ehart and Robert McCormick.

As a third defense, the defendant alleges that Albert Kinney, at the time the policies on the Dodge automobile and International truck were issued, represented to defendant that all vehicles owned by him or used by him were insured by the defendant, and that its underwriting rules would have prevented it from issuing the policies if in fact Albert Kinney had not owned the Ford or if he had a non-owned automobile in his possession available for his use and that of his family without being covered for insurance by the defendant.

There is no proof of the alleged representations. As noted supra, the evidence established that Kinney did not represent to the defendant's agent that he was the record owner of the Ford. The record is void of any evidence that Kinney ever represented to the defendant that all motor vehicles owned or used by him were insured by the defendant. Moreover, as shown by the findings of fact, supra, the defendant's agent was not required by the defendant to secure information from applicants for insurance as to whether they had use of or possession of or were using non-owned vehicles, and that he had never made such an inquiry. The lack of any proof of the representations or misrepresentations claimed by the defendant precludes the defendant from

setting up the defense of estoppel or from claiming the policies were ineffective because of misrepresentation.

The defendant has not proven that its underwriting rules would have prevented the issuance of the policies, but even if it had proven them it would have been estopped from pleading a breach of the policies based on Kinney's possession and use of the non-owned Ford. The Montana Supreme Court in the Curtis v. Zurich General Accident & Liability Ins. Co., supra, stated the rule applicable to this situation:

> "The general rule is that when the insurer at the time of the issuance of the policy had knowledge of existing facts which, if insisted on, would invalidate the contract from its very inception, such knowledge constitutes a waiver of the conditions in the policy inconsistent with the known facts, and the insurer is estopped from asserting the breach of such conditions." (108 Mont. 282, quoting from Midland Motor Co. v. Norwich Union Fire Ins. Co., 72 Mont. 583.)

See also Judge Pray's opinion in Fireman's Insurance Co. of Newark, N.J. v. Show, supra. And, since the defendant, under the rule of the Webber case, is charged with notice of facts known to its agent, it issued the policies with full knowledge and cannot now deny liability on that basis.

* * *

(The Court then discusses one phase of proceeds covered by the policy not involved in any consideration of the controlling legal issue involved here. We shall not include such unnecessary discussion in this appendix.)

* * *

CONCLUSION

* * *

The defendant had an opportunity to defend the state court action, but declined to do so. Even though the defendant acted in good faith in refusing to defend the state court action, this was in fact a breach of its contracts under the holding of the Montana court in Safeco Insurance Company v. Northwestern Mutual Ins. Co., supra, which was discussed in some detail in the memorandum opinion denying defendant's motion for summary judgment. As suggested in that opinion, the defendant could properly have instituted an action in state court in an effort to obtain a declaratory judgment of the Supreme Court of Montana modifying the Safeco rule as applied to the facts in this case. It did not do so. I am still of the opinion that in the absence of any further construction of the Montana statutes by the Montana Supreme Court, Safeco is controlling.

The plaintiff will prepare, serve and lodge judgment pursuant to the provisions of Rule 11(b) of the Local Rules of Court.

Done and dated this 20th day of August, 1965.

W. J. JAMESON
United States District Judge

Filed August 20, 1965.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20550

NATIONAL FARMERS UNION PROPERTY AND CASUALTY COMPANY,
Appellant

vs.

LAURENCE COLBRESE, JR.,
Appellee

(November 7, 1966)

Appeal from the United States District Court for the District of Montana
Billings Division

Before BARNES, JERTBERG, and ELY, Circuit Judges.

ELY, Circuit Judge:

The appellant, defendant below, appeals from the District Court's denial of its motion for summary judgment and the entry of judgment in favor of appellee. The District Court's jurisdiction was based upon diversity of citizenship of the parties and the requisite amount in controversy, 28 U.S.C. §1332, and our power of review is conferred by 28 U.S.C. §1291.

On December 3, 1960, the appellee's son was killed in an automobile accident, and appellee instituted suit for

alleged wrongful death in a Montana state court. In that suit, the defendant was Jerry Kinney, a minor who was operating the automobile in which the deceased was riding as a passenger at the time of the fatal accident. The appellant, which had issued automobile indemnity insurance policies to Jerry Kinney's father, denied obligation and refused to furnish assistance in defense of the state court action. The parties agreed that the state court should enter a judgment for $18,850 in appellee's favor. Appellee then gave Jerry Kinney a satisfaction of the judgment in exchange for an assignment in which Jerry Kinney transferred his rights against appellant to the appellee. This action followed.

Jerry Kinney was not the "named insured" in any policy issued by the insurance company, nor was the car he was driving at the time of the fatal accident, a 1949 Ford, described in any of the company's insurance policies then in force. His alleged right to indemnity rests upon a clause appearing in each of two policies issued to Albert Kinney, Jerry's father. These policies provided coverage for periods which included the date of the accident and were identical except for the designation of the vehicle described as the "owned automobile" in each of the two policies. Each policy described one of two motor vehicles which were owned by Albert Kinney, neither of which, as has been said, was the particular automobile which was involved in the accident.

The policies were each entitled, "Family Automo-

bile Policy," and each contained provisions defining those covered as "insureds." The provisions read:

"(a) With respect to the owned automobile,

(1) the named insured and any resident of the same household,

(2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured;

(b) *With respect to a non-owned automobile,*

(1) *the named insured,*

(2) *any relative, but only with respect to a private passenger automobile or trailer not regularly furnished for the use of such relative;*

(c) Any other person or organization legally responsible for the use of:

(1) an automobile or trailer not owned or hired by such person or organization, or

(2) a temporary substitute automobile, provided the actual use thereof is by a person who is an insured under (a) or (b) above with respect to such automobile or trailer." (Emphasis supplied.)

The appellee contends that Jerry Kinney was insured under the provision, italicized above, as a "relative" of Albert Kinney, "the named insured," operating a "non-owned . . . private passenger automobile . . . not regularly furnished for the use of such relative."

A disputed fact question was resolved by the jury, which in its answer to a special interrogatory, found that the 1949 Ford was "not regularly furnished for the use of" Jerry Kinney.

The determinative issue on this appeal is whether or not, at the time of the accident, the Ford was, with respect to the named insured, Albert Kinney, a "non-owned automobile." The district judge determined, as a matter of law, that it was.

At some time before February 25, 1957, one Ehart had owned the Ford, and a Montana certificate of title had been issued to him. Ehart died on the last mentioned date, leaving Robert McCormick as his sole heir. McCormick died later in 1957, leaving all his property to his wife. Mrs. McCormick then, in 1957[1] agreed to sell the Ford to Albert Kinney. She was paid the whole agreed consideration by Kinney, and she delivered to Kinney the keys and the Montana registration certificate. Kinney was, with the registration certificate, enabled to purchase a Montana license for the car in his own name. No certificate of ownership was executed or transferred to him. Since the purchase in 1957, both Mrs. McCormick and Albert Kinney have regarded the automobile as being the property of Kinney. He repaired it and restored it to operating condition in 1958. He maintained possession of it and purchased insurance to cover its operation. He insured it with the defendant company as the "owned automobile" under "family" policies from September 2, 1958, to September 2, 1960. The car then ceased to function properly, and the insurance was not

---

1 While the finding of the district judge is that the sale took place "on or prior to September 2, 1958," the parties agree in their briefs to this court that it occurred during the year 1957.

renewed. Despite numerous requests by Kinney to the attorney handling the Ehart estate, no certificate of title had been furnished to him or obtained by him. As a result, the only outstanding certificate of title to the Ford at the time of the accident was that which had been issued to Ehart in June, 1951.

The relevant provisions of the Montana statute relating to sale and transfer of automobiles are as follows:

> "(a) Upon a transfer of any title or interest of an owner or owner in or to a motor vehicle registered under the provisions of this act as hereinbefore required, the person or persons whose title or interest is to be transferred shall write their signatures with pen and ink upon the certificate of ownership issued for such vehicle, in the appropriate space provided upon the reverse side of such certificate, and such signature shall be acknowledged before a notary public.
>
> (b) Within ten (10) days thereafter, the transferee shall forward both the certificate of ownership so endorsed and the certificate of registration, together with the information required under section 53-107, to the registrar, who shall file the same upon receipt thereof and no certificate of ownership and certificate of registration shall be issued by the registrar of motor vehicles until the outstanding certificates are surrendered to that office or their loss established to his reasonable satisfaction.
>
> (d) *Until said registrar shall have issued a certificate of registration and certificate of ownership and statement as hereinbefore provided, delivery of any motor vehicle shall be deemed not to have been made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective for any purpose.*

(e) In the event of a transfer by operation of law of any title or interest of an owner of the legal title or owner in and to a motor vehicle registered under the provisions of this act, as upon inheritance, devise or bequest, order in bankruptcy or insolvency, execution sale, repossession upon default in the performance of the terms of a lease or executory sales contract, or otherwise than by voluntary act of the person whose title or interest is so transferred, the executor, administrator, receiver, trustee, sheriff or other representative or successor in interest of the person whose title or interest is so transferred shall forward to the registrar of motor vehicles an application for registration in the form required for an original application for registration, together with a verified or certified statement of the transfer of such title or interest which statement shall set forth the reason for such involuntary transfer, the title or interest so transferred, the name or names of the person or persons to whom such title or interest is to be transferred, the process of procedure effecting such transfer and such other information as may be requested by the registrar and with such statement shall be furnished such evidence and instruments as may otherwise be required by law to effect a transfer of legal or equitable title to or an interest in chattels as may be required in such cases, and in the event the registrar shall be satisfied that such transfer is regular and that all formalities as required by law have been complied with, he shall cause to be sent to the owner, conditional sales vendors, lessors, mortgagees and other lienors, as shown by his records notice of such intended transfer and thereafter, but not less than five (5) days thereafter, shall register such motor vehicle and shall issue a new certificate of ownership and certificate of registration to the person or persons entitled thereto. The notice herein required shall be deemed complied with by deposit in the post office in Deer Lodge, Montana, such notice, postage prepaid, addressed to such person or persons at the respective addresses shown on his records." Section 53-109, R.C.M. 1947. (Emphasis supplied.)

The district judge determined, under section 53-109(d), italicized above, that the attempted transfer of ownership from Mrs. McCormick to Albert Kinney was a nullity. He concluded that he was compelled by the decisfon of the Supreme Court of Montana in *Safeco Insurance Co. v. Northwestern Mutual Ins. Co.*, 142 Mont. 155, 382 P.2d 174 (1963), to hold that the Ford was, in its relation to Albert Kinney, a "non-owned automobile," because no certificate of title in Kinney's name had ever been issued.

Appellant must admit, and it does, that there was no compliance with section 53-109(a) and (b), if such was required, and appellee concedes that section 53-109(d) applies, by its own terms, only to transactions which are required to be formalized pursuant to the procedures "hereinbefore" prescribed, that is, prescribed by section 53-109(a), (b) and (c). The dispute, then, concerns the applicability of subsection (d). Appellant contends that the course of events by which the ownership of the car passed from Ehart through the McCormicks to Albert Kinney—in practical effect, at least, if not in legal contemplation—falls entirely within section 53-109(e) and that subsection (d) is therefore inapplicable. We disagree.

Whether the Montana registrar of motor vehicles would require successive transfers of title, first from Ehart to Robert McCormick, then from Robert McCor-

mick to Mrs. McCormick, and, finally, from Mrs. McCormick to Albert Kinney, or whether, upon being made aware of the circumstances, he would issue only one certificate of title, and that in the name of Albert Kinney, without the intermediate steps having been taken, is of no moment. The fact is that, since the instant before the death of Ehart, there have been three transfers or attempted transfers of the ownership of the automobile. In none of these were the requirements of section 53-109 satisfied. For reasons deemed by it to be sufficient, the Montana Legislature has declared that the prescribed procedure for the voluntary transfer of title to automobiles shall be mandatory. If appellant's construction of the statute were correct, then at any time when a transfer by operation of law occurred, the successive owners of the automobile involved could thereafter ignore the legislative mandate with impunity. It cannot be that the Legislature intended that its mandate might be so easily avoided, nor do we feel constrained by the language of the statute to so hold. The first two transfers were undoubtedly by operation of law, governed by section 53-109(e), but the third, from Mrs. McCormick to Albert Kinney, was not. It was a voluntary transfer and, as such, was required to be made pursuant to subsections (a) and (b). Since it was not so made, section 53-109(d) declares that "said intended transfer shall be incomplete and not be valid or effective for any purpose."

We do not believe, however, that our foregoing conclusion is dispositive. As we read section 53-109(e), its only effect is that legal title to an automobile cannot pass to a voluntary transferee in the absence of compliance with the statutory procedure. Since there was no such compliance here, legal title did not, "for any purpose," pass to Albert Kinney. The crucial question is not the identity of the holder of the legal title but whether or not the car was "non-owned" by Kinney as the term is employed in the insurance contract.

In *Matsuo Yoshida v. Liberty Mutual Insurance Co.*, 240 F.2d 824 (9th Cir. 1957), and in *Teixeira v. Globe Indemnity Company*, 349 F.2d 502 (9th Cir. 1965), our court recognized that even if a statute purports to define ownership of an automobile, the provision does not necessarily fix the meaning of the phrase "owned automobile" as the phrase is employed in an insurance policy; rather, it is the meaning intended by the parties which controls.

In *Teixeira, supra,* the insured's stepson was involved in an accident while driving a car which had been left with the family some five months earlier by a friend who left to work on board a ship. It was intended by the friend that the members of the family would use the car during his absence, but there was never any agreement to purchase the car, nor were any payments to him ever made. As the court interpreted the policy,

which contained provisions similar to those contained in the policies before us, the insurer would be liable only if the car was an "owned automobile" of the insured. We affirmed the judgment of the District Court, being "aware of no decision of a reviewing court which has extended the usual and ordinary meaning of the definition of the word 'owned automobile' which appear in the insurance policy in the instant case to include such a tenuous relationship as existed between Mrs. Teixeira and the Corvair automobile." 349 F.2d at 505.

Liability of the insurer in *Yoshida, supra,* was dependent upon a finding, as is the liability of the appellant herein, that the automobile was "non-owned." Gonzales, the insured, was a conditional sale contract vendee, and legal title remained in the vendor at the time of the accident. It was held that Gonzales was nevertheless the owner of the car and that his insurer was not liable. An applicable California statute defined "owner" to include the purchaser under a conditional sale agreement, but we noted,

> "Of course, the statutory definition is not necessarily controlling for the words of a contract are to be taken in their ordinary and popular sense. . . . We believe, however, that common understanding of the words 'owner' and 'own' with respect to automotive vehicles accords with our view. Under law the conditional vendee has the beneficial interest in the automobile, including the right of possession. *It is his to drive and use. He lacks only the bare legal title.* . . . If the clause has any common or popular meaning, it means that a person in Gonzales' position is the owner of the car. Indeed, Gonzales so

understood, for in the accident report filed after the first accident he inserted his own name in the blank marked 'owner'." 240 F.2d at 827. (Emphasis added.)

Appellee argues that, despite the fact that this court might be disposed to allow the controversy to turn on the meaning of the concept of ownership as it was employed by the parties to the insurance contracts in question, we are bound by the decision in *Safeco Insurance Co. v. Northwestern Mutual Ins. Co., supra,* to affirm. If *Safeco* had decided the very question involved in the instant case, we would, of course, be constrained to follow. *Shuttlesworth v. Birmingham,* 382 U.S. 87, 91, 15 L. Ed. 2d 176, 86 Sup. Ct. 211 (1965). We do not, however, interpret that decision as laying down a hard and fast rule to the effect that an automobile may not under any circumstances be an automobile owned by the insured within the meaning of an insurance policy unless the insured is the holder of the certificate of ownership.

The instant case is distinguishable from *Safeco* in several material respects.[2] The accident resulting in *Safeco* occurred only *one day* after Harlan Dean, the insured driver, agreed to purchase the car from a dealer, at a time when a substantial portion of the agreed consideration remained unpaid. No papers of any kind

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2 The District Court recognized this, writing, "Admittedly the factual situation here is distinguishable [from Safeco] in many respects." The District Court also recognized that "It is possible . . . that as applied to a different factual situation the Supreme Court of Montana would modify its interpretation of §53-109(d)."

were executed or handed over to Dean. There were no records of the sale, not even entries on the dealer's books. Emphasizing the extremely tenuous nature of the agreement, the opinion notes that Dean, after recovering from injuries suffered in the accident, reclaimed his "trade-in" vehicle from the dealer, "and the matter was at an end." In our case, on the other hand, Kinney had paid the entire agreed price, and he had enjoyed undisputed dominion and control over the Ford for a period of nearly three years prior to his son's accident. Moreover, while in *Safeco* neither the dealer nor Dean had made any attempt to comply with the Montana registration or transfer statutes, Kinney had obtained the certificate of registration from Mrs. McCormick. He had bought state licenses and insurance for the car, and he had attempted in an informal way to obtain a certificate of title. The claimed transfer in *Safeco* was even more uncertain than that which our court, in *Teixeira,* characterized as "tenuous." Of Kinney and the 1949 Ford we can say, as we did in *Yoshida, supra,* "It is his to drive and use. He lacks only the bare legal title."

The dealer's insurer in *Safeco* was held to be primarily liable, as against Dean's insurer, under a "garage owners liability policy." Such a policy is designed to provide protection in special situations to persons who, by their occupation, are in regular and frequent contact with a number of motor vehicles, the identity of which

is subject to constant change. An insurer issuing such a policy to an automobile dealer must surely contemplate that its protection extends to the use of cars by prospective purchasers. On the facts of *Safeco*, we believe that Dean could have been characterized as being no more than that.

On the other hand, what were the expectations of the parties to the insurance contracts involved in this litigation? The insurer knows that an insured may be the owner of two or more automobiles. For what reason, then, was coverage under a "family automobile policy" extended to a relative's use of non-owned *automobiles*, more than one, not regularly furnished for his use, but only to his use of *the* owned *automobile*, the *one* owned automobile described in the policy? The obvious reason is the frequency with which the owned and described automobile is used or may be used by members of the household. In consideration of an actuarially determined price, or premium, the insurer agrees to indemnify the family members against some of the liabilities to which their driving of motor vehicles might subject them. The more "owned" automobiles or "regularly furnished" non-owned automobiles to which a family has access, the more likely it is that liability will be incurred. Condition 4 of the policy[3] indicates that more than one automobile may be insured, but that would be

---

3 "When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each . . . ."

done, we must assume, only in consideration of a higher premium.

A fundamental principle of insurance law is that a policy is to be construed liberally in favor of the insured and strictly against the insurer, who normally is responsible for the language it contains. As was said in *Holmstrom v. Mutual Benefit Health & Accident Ass'n*, 139 Mont. 426, 364 P.2d 1065 (1961),

> "The policy holder must be protected against conflicting, confusing and ambiguous statements in policies and whenever there are two constructions that can be placed upon a policy this court believes the better rule is to apply that construction most favorable to the policy holder." 364 P.2d at 1067-68.

That sentiment does not prevent application of the more general principle that an insurance policy, like any other contract, must be given an interpretation which is reasonable and which is consonant with the manifest object and intent of the parties.[4] It is manifest here that there was no doubt in the mind of Albert Kinney that he was the owner of the Ford. His recognition of his owner-

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4 In the interpretation of questionable provisions of an insurance contract, it is the reasonable expectation of the insured which controls. "Although courts have long followed the basic precept that they would look to the words of the contract to find the meaning which the parties expected from them, they have also applied the doctrine of the adhesion contract to insurance policies, holding that in view of the disparate bargaining status of the parties we must ascertain that meaning of the contract which the insured would reasonably expect."

Gray v. Zurich Insurance Company, ... Cal. 2d.....', ..., ... Cal. Rptr. ....., ... P.2d ..... (Oct. 25, 1966) (Footnotes omitted).

See also Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629, 637 (1943); Patterson, The Interpretation and Construction of Contracts, 64 Colum. L. Rev. 833, 858 (1964). Cf. 3 Corbin, Contracts §545 at 164 (1960).

ship is clearly evidenced by facts already mentioned, including the fact that for two years of the period of his dominion, he had paid additional premiums as consideration for a separate policy to insure the particular car.

Since 1957, when Mrs. McCormick agreed to sell the Ford to Albert Kinney and surrendered possession to him when she received the agreed price, no person questioned or attempted to disturb Kinney's claim of ownership. Even in this lawsuit there is no contention that the car belongs to someone other than Albert Kinney. The assertion is simply that it is "non-owned" by him. He had, for almost three years before the accident, exercised complete dominion and control over the vehicle. He possessed it, and he repaired it. He held, and presumably still holds, the certificate of registration. He secured state licenses for the car, and for two years he drove it and insured it in a separate policy agreement with the appellant company. Now it is he himself, in effect, through his minor son's assignee, who asserts that the vehicle was "non-owned" by him. If section 53-109(d) did not exist, no reasonable person could question the fact that Kinney was, in every true sense of the word, the owner of the car. If he owned the vehicle, it was not a "non-owned" vehicle within the meaning of the insurance contract. The Montana statute requires us to do no more than to admit that "legal title" did not pass to him.

To hold that Albert Kinney was not the owner of the Ford within the meaning of the policies in suit would do violence to the intention of the parties, to traditional legal concepts of ownership, and to our own sense of right and wrong. There is no Montana authority which, on its facts, compels us to apply the technical statutory requirements for transfer so as to torture the terms of a contract. Absent such compulsion, we will not require appellant to underwrite a risk which it did not sell and for which it was not paid. Upon remand, the action will be dismissed.

Reversed.

Office of the Clerk
U. S. COURT OF APPEALS
P. O. Box 547
San Francisco 1, Calif.

Nov. 7, 1966

Crowley, Kilbourne, Haughey, Hanson & Gallagher
Elec. Bldg.
Billings, Montana

Dear Sir:

In case No. 20550 NATL FARMERS UNION V COLBRESE, JR an opinion..... was this day filed, in accordance with which a Judgment or Decree was filed and entered Reversing, etc., judgment of Decree of the Court below.

Pursuant to Rule 26, and unless the mandate is stayed by the order of the Court, or unless a petition for a rehearing of the cause be filed meantime, and as provided by Rule 23, a mandate of this Court will be due to issue on the expiration of 30 days from date hereof.

Time for certiorari petition, Civil cases: 90 days Criminal cases: 30 days.

Sincerely,

Wm. B. LUCK
Clerk

Office of the Clerk
U. S. COURT OF APPEALS
P. O. Box 547
San Francisco, California 94101

Dec. 8, 1966

Messrs. Wiggenhorn, Hutton, Schiltz & Sheehy
Attorneys at Law
Electric Bldg.
Billings, Montana

Dear Sir:

The Petition for a Rehearing..... heretofore filed in case No. 20550 — NATIONAL FARMERS UNION PROPERTY & CASUALTY CO. v. LAURENCE COLBRESE, JR. was this day denied.

Pursuant to Rule 26, and unless stayed by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of five (5) days from the date hereof.

Time for certiorari petition: Civil cases, 90 days; Criminal cases, 30 days.

Sincerely,

FRANK H. SCHMID,
Clerk.

APPENDIX B

I. Excerpts from Brief of Appellant Safeco Submitted on Appeal to Montana Supreme Court.

(Appell. Br. p. 1)

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No. 10432

IN THE

SUPREME COURT

OF THE

STATE OF MONTANA

SAFECO INSURANCE COMPANY OF AMERICA, A Corporation, and HARLAN DEAN,

Plaintiffs and Appellants,

vs.

NORTHWESTERN MUTUAL INSURANCE COMPANY, A Corporation, and BEAR PAW SALES & SERVICE, INC., A Corporation,

Defendants and Respondents.

APPELLANTS' BRIEF

STATEMENT OF THE CASE

* * *

(Appell. Br. pp. 6-7)

We think it will be agreed that the issue here is quite narrow: If Dean was the "owner" of the Studebaker on May 11th the Safeco policy is responsible; if Bear Paw was the "owner" then the Northwestern policy is responsible up to its limits, beyond which Safeco becomes responsible as the "excess" insurer.

On the mixed question of law and fact the trial court made the only finding of fact which is disputed (VII, R. p. 40) to the effect that Bear Paw "sold" the

Studebaker to Dean on May 10th and that on the 10th, Dean delivered possession of the Hillman to Bear Paw and Bear Paw delivered possession of the Studebaker to Dean.

* * *

As a part of the same finding the Court further found, "That it was then and there the intention of the parties that Harlan Dean should become the owner of the Studebaker automobile and that at all times subsequent to the 10th day of May, 1960, Harlan Dean possessed said automobile and drove it as the owner thereof." (R. p. 41).

The Court then made four Conclusions of Law which may be summarized as follows:

1. There was a completed sale under the general law of sales and at the time of the accident Dean was the owner not driving by permission from Bear Paw but as a matter of right as owner.

2. The Studebaker was not owned by Bear Paw as the word "owner" is used in the Northwestern policy.

3. Dean was owner of the Studebaker as the word "owner" is used in the Safeco policy and the Studebaker was a replacement automobile under the policy.

4. The Northwestern policy does not protect Dean and the Safeco policy does. (R. p. 42-43)

Decree accordingly was entered in favor of the defendants. (R. p. 43)

* * *

(Appell. Br. pp. 13, 30)

ARGUMENT

I. *Motor Vehicles Can Be Transferred or Ownership Acquired Only By Certificate of Title In Compliance with Section 53-109, R.C.M. of 1947.*

* * *

We have found no authority under statutes anywhere near comparable to Section 53-109 where any change of ownership or interest was upheld absent delivery of the properly endorsed and acknowledged certificate of title. The Court here simply ignored Section 53-109 in favor of some "general law of sales." Therein lies, we think, the fundamental error in this case.

* * *

(Appell. Br. pp. 34-35)

III. *The Effect of "Ownership" On The Insurance Coverage.*

A. THE INSURANCE POLICIES

There is no dispute as to the provisions of the respective insurance policies or the court's findings of fact thereon. Nor do we anticipate dispute on the following propositions:

(1) If, as a result of the dealings between the parties Dean became the owner of the Studebaker and Bear Paw ceased to be the owner, on the 10th of May, then the Safeco policy covers the accident on the 11th, because the Studebaker was a replacement automobile. This follows from the terms of the Safeco policy in which the Hillman car was described, reading:

"PERSONS INSURED: The following are insureds under the Liability Section.

(a) With respect to the owned automobile.

(1) the named insured and any resident of the same household."

"'OWNED AUTOMOBILE' means the described private passenger or utility automobile, *any replacement automobile,* any additional automobile, or any trailer owned by the named insured; it also includes a temporary substitute automobile;

"'REPLACEMENT AUTOMOBILE' means any private passenger or utility automobile *of which the named insured acquires ownership;* provided it replaces the owned automobile and notice of its delivery be given 'SAFECO' within the policy period then current or within 30 days, whichever is greater."

(R. p. 34)

(2) If, as a result of the dealings between the parties Bear Paw continued to be the owner of the Studebaker and was the owner on the 11th, then Northwestern is liable on its policy under the following terms thereof.

"(b) *Owned Automobile and Non-Owned Automobile.* The term 'owned automobile' means an automobile or trailer owned in full or in part by or registered in the name of the named insured; and the term 'non-owned automobile' shall mean any other automobile."

(R. p. 37)

"III. DEFINITION OF INSURED: The unqualified word 'insured' includes not only the named insured, but also (1) . . . (2) any person while using an owned automobile or a hired automobile, and any person or organization legally responsible for the use thereof, provided the actual use is by the named insured or with his permission."

(R. p. 38)

This latter clause has been designated in the decisions as the "omnibus clause" and will be so referred to in this brief.

* * *

II. Excerpts from Brief of Respondent Northwestern Mutual Submitted on Appeal to Montana Supreme Court.

No. 10432

IN

SUPREME COURT

THE

STATE OF MONTANA

SAFECO INSURANCE COMPANY OF AMERICA, a Corporation, and HARLAN DEAN,

Plaintiffs and Appellants,

vs.

NORTHWESTERN MUTUAL INSURANCE COMPANY, a Corporation, and BEAR PAW SALES & SERVICE, INC., a Corporation,

Defendants and Respondents.

RESPONDENT'S BRIEF

From the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Hill

APPEARANCES:

MESSRS. HALL, ALEXANDER & KUENNING
414 Strain Building
Great Falls, Montana
Attorneys for Plaintiffs and Appellants

MESSRS. SMITH, BOONE & KARLBERG
Higgins Block
Missoula, Montana
Attorneys for Defendants and Respondents

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I.

STATEMENT OF THE CASE

A. *SUMMARY*

Bear Paw Sales & Service, Inc., called Bear Paw, sold a Studebaker car to Dean and delivered possession of it to Dean on May 10, 1960, Bear Paw took in trade a Hillman car. On May 11th Dean had an accident with the Studebaker injuring one Smith. At the time of the accident, the certificate of title to the car stood in the name of Luebben, Pear Paw's predecessor in interest, but was held by Bear Paw. The certificate of title was not delivered to Dean nor was it endorsed to show his ownership.

At the time of the accident Dean owned a liability insurance policy issued by Safeco, and Bear Paw owned a liability insurance policy issued by Northwestern. If Dean was the "owner" of the car on May 11th, the Safeco policy is responsible. If Bear Paw was the "owner" on May 11th, Northwestern is responsible.

The sole problem in the case is one of definition. What does the word "owner" mean as used in two policies?

B. *STATUTORY LAW*

Section 53-133, subd. f, R.C.M. 1947, reading:

"The term 'owner' shall include any person, firm, association or corporation owning or renting a motor vehicle, or *having the exclusive use thereof,* under *lease or otherwise,* and shall also include a *contract vendee.*"

Section 53-419, subd. 10, R.C.M. 1947, reading:

" 'Owner.' A person who holds the legal title of a motor vehicle, or in the event a motor vehicle is the subject of an agreement for the conditional sale or lease thereof, with the right of purchase upon performance of the conditions stated in the agreement, and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purposes of this act."

Section 53-109, R.C.M. 1947, reading: (Quoting the the statutes).

(Resp. Br. pp. 1-6)

* * *

II.

ARGUMENT

A. *THE PROBLEM*

The problem here is one of definition. What does the word "owner" mean as used in the insurance policies written by the respective companies? An insurance policy is a contract. (Sec. 2, Ch. 286, L. 1959.) Contracts of insurance are to be interpreted as other contracts, and must be interpreted to give effect to the mutual inten-

tion of the parties. (Sec. 13-702, R.C.M. 1947; Stevens v. Steck, 101 Mont. 569, at 576, 55 Pac. 2d 7.)

Respondents contend that Section 53-109(d) R.C.M. 1947, is a recording statute governing the record title as distinguished from ownership; that Section 53-133, R.C.M. 1947, defines ownership.

Respondents recognize the rule that the law in existence at the time of the formation of a contract may be read into it. (Appellants' Brief, p. 35-36.) Such rule is of no real assistance here because the problem is, which law do we read in? The major effort of this brief is to indicate that Section 53-133 R.C.M. 1947, which defines "owner" should be read into the contract, and that Section 53-109(d), which does not so much as use the word "owner," should not.

B. *THE MEANING OF THE WORD 'OWNER."*

(1) *The intention of the parties and practical consideration.*

(a) * * * Dean, on the other hand, was interested in protecting himself from liability. He was probably not concerned with the technical requirements of title nearly as much as the real facts of his ownership and liability which might follow it. He might be surprised indeed to find that an automobile which he owned in the normal sense of the word was not covered by his insurance contract because of some unexpected meaning given his policy by the Montana registration laws. Normally we would expect that the parties would intend a cut-off date gov-

erning the insurance company liability to be the date upon which the right to control the vehicle involved changed. The word "owner" therefore would, if interpreted in accordance with what the parties intended be construed to include persons who, because of basic property rights, had a right of control and to exclude those who did not.

(b) The force of this argument is illustrated by the other words used in the policy. Before there can be liability here under the Northwestern policy, we must not only contort the word "owner," but must contort the word "permission" as well, since Northwestern is liable only if the car was owned by Bear Paw and driven by Dean with Bear Paw's permission. The fact is that Dean drove the car as a matter of right under a claim of ownership.

* * *

Giving the word "owner" a normal meaning, Dean has the insurance he bargained for and is not dependent for his protection on the happenstance of his vendor's coverage.

(c) As a practical matter the law gains nothing by the application of the unrealistic language of Section 53-109d to the interpretation of the word "owner" as it appears in the policies under consideration.

(Resp. Br., pp. 13-17)

* * *

(2) Dean was the Owner under the General Law of Sales.

Under the law of sales, uncomplicated by the statutes pertaining to automobile registration, Harlan Dean was the owner of the Studebaker on the 11th of May, 1960. At that time the car was identified, the possession was delivered, the price was agreed upon, part payment had been made by delivery of Dean's Hillman to Bear Paw, and there was an agreement that the balance due could be paid in any way that Dean wanted it.

Section 67-1703, R.C.M. 1947, provides:

> "The title to personal property, sold or exchanged passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not."

Certainly the conditions of this section were met. The passing of title once the thing to be sold is identified is largely a matter of intent.

* * *

In this case all parties are agreed that it was intended that Dean was the owner of the Studebaker.

(Resp. Br. p. 18)

* * *

4. *The registration law (Section 53-109d) should not control the definition of ownership.*

It is Respondents' position that the insurance policies involved should not be defined on the basis of Section 53-109d, because:

(a) Such a result is unrealistic,

(b) Is not compelled by the statutes,

(c) Is not compelled by the case authority.

(a) *A literal application of 53-109d is unrealistic.*

We deal here with a registration law which uses broad language but which does not indicate any intention to alter either the basic law of torts or contracts. Professor Hudson, in an article on the Motor Vehicle Certificates of Title Act, 3 Drake L. Rev. 21-22, commented on such laws as follows:

> "It should be recognized, however, that whenever a statute is drafted in such inclusive and comprehensive language that purports to change generally accepted rules on the disposition of property, consequences will be felt in many areas perhaps not anticipated by the legislature."

We deal here with one of the "unanticipated consequences" and the problem is whether the court should so interpret the law as to create more unanticipated consequences than are necessary. Since interpretation is required, and it is because if Section 53-109d is held to control the word "owner," it will conflict with both 53-133f and 53-419, subd. 10, the court has some freedom. That freedom should be exercised to produce results grounded in some reality rather than in technical and artificial results.

* * *

It should be remembered here that if 53-109d is held to govern ownership, that it will govern it whole hog and that there is no place short of the actual issuance of the registration certificate at which the court can say

that ownership has changed. Since the results which would follow such a holding are so utterly absurb and will result in such manifest injustices the court should not so hold unless compelled by the statute to do so. There is no such statutory compulsion.

(Resp. Br. pp. 24-25, 27)

* * *

5. *Section 53-133(f), R.C.M. 1947, should control the meaning of the word "owner."*

Respondents contend that since Section 53-133(f) does define the word "owner," in connection with motor vehicles, it should govern the meaning of the word "owner," when that word is used in an automobile insurance contract. As late as 1947, 53-133(f) was amended. At that time the registration laws (53-109) were on the books in their present form. If there is a conflict between 53-109d and 53-133f, then, since 53-133 is later in time, it should apply. Likewise, since 53-133 deals with the word "owner" and 53-109d does not, there is further reason why the former should control.

* * *

Section 53-133f clearly contemplates that all persons having exclusive use, under some form of a contractual right are owners. Thus, renters, lessees, owners and contract vendees are specified. It makes no sense to classify a renter under an oral renting arrangement as an owner and to exclude from the definition a person who under an enforceable oral contract of sale has be-

come entitled to all rights of title and possession.

Appellants seek to avoid the effect of 53-133f by designating it as a registration and licensing statute. The vice in that argument is that if 53-133f is a licensing law, so equally is 53-109d. If licensing laws are to be read into contracts, and that is what Appellants seek to do with 53-109d, then all licensing laws must be read in, and if there is a conflict the most appropriate should be the one chosen.

The language used in the Montana Owners' Responsibility Law is persuasive here.

(Resp. Br., pp. 28-29)

* * *

6. *The Case Authority*

(a) *Montana Cases*

* * *

(b) *Foreign Cases*

The value of the case authority from foreign jurisdictions is dubious since nowhere do we find the exact statutory pattern which exists in Montana. Support for either position may be found in some of the language in the cases if statutory distinctions are ignored.

(1) *California*

The California registration law is the same as the Montana registration law. The California cases are complicated by the fact that California has a Responsibility Law which places a vicarious liabilty upon owners in the absence of the notification required by the responsi-

bility statutes. For about two decades the California Courts have struggled with the problems which the Montana Court here faces. After some indecision the California Courts have held that "ownership" does change despite the registration law and that the omnibus clause of a vendor's insurance policy is not liable where there has been a failure to comply with the registration law. Because of this long struggle and because the California courts have reached results which do not ignore the realities, we believe the California cases to be persuasive.

* * *

Ownership as distinguishable from title in California is not controlled by the registration law.

(Resp. Br., pp. 31, 32-33)

* * *

(Between pages 33 and 45 Respondent cites, quotes, and discusses the following California cases:)

Henry v. General Forming, Limited, (Cal.), 200 P.2d 785 (Br. p. 33);

Willard H. George v. Barnett (Cal. App.), 150 P.2d. 591 (Br. p. 34);

Goodman v. Angelo-California Trust Co. (Cal. App.), 217 Pac. 1078 (Br. p. 34);

Sly v. American Indemnity Company of Galveston (Cal. App.), 15 P.2d 522 (Br. pp. 35, 37, 38);

Swing v. Lingo (Cal. App.), 19 P.2d 56 (Br. p. 35);

Piacun v. Hexem (Cal. App.), 63 P.2d 315 (Br. p. 36);

Votaw v. Farmers Automobile Inter-Insurance Exchange (Cal.), 85 P.2d 872, 97 P.2d 958 (Br. pp. 37, 39);

Harbor Insurance Co. v. Paulson (Cal. App.), 286 P.2d 870 (Br. pp. 38, 41);

Venne v. Standard Accident Ins. Co. (Cal. App.), 340 P.2d 30 (Br. pp. 38, 43);

Bunch v. Kin (Cal. App.), 37 P.2d 744 (Br. p. 39).

* * *

(Following the case discussion the Respondent's Brief concluded.)

Clearly in California the counterpart of Section 53-109d does not govern the meaning of the word "owner"; does not in a case such as this make the omnibus clause effective.

(2) *Other Jurisdictions*

As previously indicated cases reaching differing results on differing statutes may be found in the foreign jurisdictions. There are cases holding that statutes similar to or even more restrictive than the Montana Statute do not govern the meaning of the word "owner" and do not make the omnibus clause liable in situations such as the one at bar.

(Resp. Br., pp. 45-46)

* * *

CONCLUSION

It is submitted that Judge Elwell reached the correct result in this case. We are after all concerned with the definition of the word "owner." If that word is given the meaning in law that it bears in the minds of people, then sensible results may be reached. But if we attach to the word artificial meanings because of a statute which does not use the word "owner," then many consequences will follow which neither the parties nor the legislature intended. When we twist words so that they do not mean what the people who use them think they mean, harsh and unjust results are bound to follow.

(Resp. Br., pp. 51-52)

SUPREME COURT, U. S.

No. 1073

FEB 17 1967

JOHN F. DAVIS, CLERK

In the Supreme Court

of the

United States

October Term 1966

LAURENCE COLBRESE, JR.,

Petitioner,

vs.

NATIONAL FARMERS UNION PROPERTY & CASUALTY COMPANY,

Respondent.

Respondent's Brief Opposing Petition for Writ of Certiorari

JOHN M. SCHILTZ
JOHN C. SHEEHY
403 Electric Bldg.
Billings, Montana

Of Counsel:

GEORGE J. HUTTON
JOHN M. SCHILTZ
JOHN C. SHEEHY
403 Electric Bldg.
Billings, Montana

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Respondent's Brief Opposing Petition for Writ of Certiorari

Respondent National Farmers Union Property & Casualty Company respectfully submits this brief opposing the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals:

STATEMENT

The decision in *Laurence Colbrese, Jr., vs. National Farmers Union Property & Casualty Company* in the Ninth Circuit Court of Appeals, out of which the petition in this cause arises, is reported at 368 F.2d 405 (1966). It will be hereafter referred to as "Colbrese."

The decision of the Montana State Supreme Court, with which petitioner claims Colbrese is in conflict, is *Safeco Insurance Company v. Northwestern Mutual Insurance Company* (Mont. 1963) *382 P.2d 174*. We shall refer to it as "Safeco."

The essential facts in Colbrese were undisputed between the parties. They were established by admissions in the pleadings, by responses to demands for admissions, and by stipulation. Respondent deems the statement of facts in the petition here inadequate to give the Supreme Court a clear picture in Safeco and in Colbrese. Accordingly we set forth those facts here.

(a) Facts in Colbrese Case.

The Colbrese action involves the interpretation of the phrase "non-owned automobile" contained in insurance policies issued by the respondent to one Albert Kinney. The claim for coverage under the policies arises out of a fatal accident involving a 1949 Ford automobile operated by one Jerry Kinney, the son of Albert Kinney.

The petitioner, Laurence Colbrese, Jr., is the father of the decedent involved in the fatal accident and is in

this case as the assignee of Albert Kinney, the purported insured.

In and prior to 1957, the record owner of the 1949 Ford automobile was one C. W. Ehart. By "record owner" we mean that the Registrar of Motor Vehicles of the State of Montana had issued to C. W. Ehart a Certificate of Ownership pertaining to said vehicle. C. W. Ehart died, leaving as his sole heir, one Robert McCormick. Upon Ehart's death Robert McCormick became entitled, as the sole heir, to all of Ehart's right, title and interest in the Ford. Then Robert McCormick also died, leaving as his sole heir Mrs. Robert McCormick, his widow, who thereupon became entitled to all of Robert McCormick's right, title and interest in the said Ford.

In 1957, after the death of Ehart and Robert McCormick, Mrs. Robert McCormick sold or agreed to sell, the 1949 Ford automobile to Albert Kinney.

Albert Kinney paid the full consideration to Mrs. Robert McCormick for the Ford. He took possession of the vehicle and used it as his own for nearly three years. The record is clear that the only person who could claim adverse title to the Ford, Mrs. Robert McCormick, claims no title to it, and since the time of the transaction has regarded Albert Kinney as the owner of the Ford.

At the time of the transaction Albert Kinney received from Mrs. Robert McCormick the "Certificate

of Registration and Tax Receipt" upon which license plates are issued in Montana. Albert Kinney actually paid for the Montana license plates for the Ford automobile for the years 1959 and 1960.

The C. W. Ehart estate is the subject of a probate proceedings in the appropriate state district court in Yellowstone County, Montana. Mrs. McCormick, as well as being the sole heir of that interest, was also the administratrix of the Ehart estate at or about the time of the transaction with Kinney.

Since 1957 Kinney has claimed to be the owner of the Ford, has been in possession of it, and thought himself to be the sole owner of all right, title and interest to it.

However, the "Certificate of Ownership" issued by the Registrar of Motor Vehicles of the State of Montana, has not been delivered to Albert Kinney by Mrs. McCormick or anyone else.

Albert Kinney requested of Thomas Bradley, Esq., the attorney representing Mrs. Robert McCormick in the transaction, and also the attorney handling the C. W. Ehart estate, on several occasions, that the title certificate of ownership of the Ford be issued to him. He made these requests before the fatal accident occurred.

After Albert Kinney acquired the Ford, he procured from this respondent a policy of insurance on the Ford, providing for bodily injury liability and property damage coverages. Albert Kinney paid the re-

spondent company the insurance premiums due upon this policy for the years 1958 and 1959, but he allowed the policy to lapse for non-payment of premium on September 2, 1960. Thus, this policy of insurance was lapsed and not in effect on the date of the death of the minor, Duane Colbrese, December 3, 1960.

On that date, December 3, 1960, when Jerry Kinney, the son of Albert Kinney, was driving the Ford, it ran off the highway on an icy stretch, upset, and thereby brought about the fatal injuries to the person of Duane Colbrese.

At the time of the fatal accident, however, Albert Kinney had two other motor vehicles, a 1951 Dodge passenger automobile and a 1954 International 1½ ton truck Each of these vehicles were insured by the respondent insurance company in separate policies.

Each of these policies included provisions, set out in full in the Ninth Circuit decision in *368 F.2d* at page *406*. In effect, if the 1949 Ford automobile were "a non-owned automobile" it would be eligible for insurance under the policies issued by the respondent on the Dodge automobile or the International truck.

(b) Facts in Safeco Case.

A quite different state of facts is involved in the *Safeco* decision.

In *Safeco,* Bear Paw Sales & Service, Inc., a new and used car dealer, had on hand a 1958 Studebaker car. At the same time one Harlan Dean was the owner of a 1958 Hillman automobile.

On May 9, 1960, Harlan Dean drove his Hillman to Bear Paw's premises and arranged to try out the Studebaker and show it to his wife. A price of $350.00 plus trade-in was discussed. Dean left the Hillman with Bear Paw and drove away with the Studebaker which he used in his work that day. On the following day Dean told the Bear Paw people that he would take the Studebaker. He continued in possession of the car on that day and on the following day, May 11, 1960, Dean was involved in a serious collision with the Studebaker.

At the time of the collision Northwestern Mutual Insurance Company had issued a garage owner's liability insurance policy to Bear Paw; Safeco Insurance Company had issued its policy of insurance covering the Hillman. Each company declined coverage for the collision of May 11, 1960, and the suit for declaratory judgment resulted.

The foregoing facts may be found in *382 Pac.2d* at page *175*.

Other facts important to the *Safeco* decision are these: the certificate of title to the Studebaker was never assigned by Bear Paw to Harlan Dean nor was it ever delivered to him, nor was any application for registration of the Studebaker ever executed by Dean. No papers were transferred by either party to the Registrar of Motor Vehicles to transfer the title.

Moreover, Bear Paw kept a record of all cars in stock and still had its record of the Studebaker. No

book entries were made with respect to any sale of the Studebaker automobile by Bear Paw to Dean, nothing was signed, no order was signed or paper of any kind. Dean still had the title to the Hillman automobile in his possession. Bear Paw had the title to the Studebaker automobile in its possession. No records on the Hillman appeared on the Bear Paw books.

Most important, following the accident Dean took the Hillman car back from Bear Paw, and "the matter was at an end."

The foregoing additional facts may be found in *382 P.2d*, at pages *176, 177*.

ARGUMENT

1. The Colbrese decision does not conflict with Safeco.

From the foregoing statement of facts it is clear that a much different situation faced the Ninth Circuit Court of Appeals in *Colbrese* than faced the Montana Supreme Court in *Safeco*.

In deciding *Colbrese* the Ninth Circuit Court of Appeals did not overlook the decision in *Safeco*. Rather the Circuit Court was very much aware of *Safeco* and carefully distinguished its decision in *Colbrese* from *Safeco* on the law and on the facts *(368 F.2d, pp. 409, 410)*. In a footnote, the Circuit Court noted that the District Court recognized factual distinctions in many respects *(368 F.2d, p. 410, footnote 2)*.

The Circuit Court said that it did not interpret *Safeco*, as "laying down a hard and fast rule to the effect that an automobile may not under any circumstances be an automobile owned by the insured within the meaning of an insurance policy unless the insured is the holder of the certificate of ownership." *(368 F.2d, p. 409, 410)*

There is in fact an earlier decision in the United States District Court in Montana, which buttresses the foregoing statement of the Circuit Court of Appeals. In *Firemen's Insurance Company of Newark, New Jersey v. Show,* (U.S.D.C., Mont.) *110 F. Supp. 523*, the late Judge Pray was called upon to interpret the same statutory subdivision relied on by the petitioner in this case. In the *Firemen's* case it appeared that one Jerry Show had bought a truck and took delivery of it on December 5 or 6 of 1950. Application was made to the Registrar of Motor Vehicles for a Certificate of Ownership in his name. Eventually such a certificate was received from the Registrar on December 20, 1950. But in the meantime, on December 17, 1950, before the Certificate of Ownership had been issued, the truck was involved in an accident. Jerry Show had obtained insurance on the truck on November 29, 1950, just before the purchase. The insurance company contended that because the certificate of title had not been issued on the date of the accident, Show was not the owner of the truck and the dealer was still its owner because of the provisions of *Sec. 53-109(d)*. Judge Pray summarily dis-

posed of this contention *(110 F. Supp., p. 523)* and pointed out that the insurance contract had been executed and was in effect during the time that the application had been made for the certificate of title; and that to hold for the insurance company would result in an option to the insurer to claim an alleged voidness or invalidity which would raise a cloud on every policy of automobile liability insurance. He rejected the contention of the insurance company as without merit.

The decision of Judge Pray in the *Firemen's* case occurred before the decision in *Safeco*. Yet *Safeco* did not overrule or modify the *Firemen's* decision, specifically or by implication.

The decision in *Firemen's* is not cited by petitioner in his brief to this court. Yet it constitutes an exception to the hard and fast rule claimed by the petitioner as to the effect of *Sec. 53-109(d)* relating to insurance policies.

It appears therefore that the Ninth Circuit Court of Appeals was correct in assuming that *Safeco* had not decided the very question involved in *Colbrese (308 F.2d at page 409)*. Therefore, no conflict exists between the two cases.

Petitioner has taken general statements from the *Safeco* decision, and attempted to give those general statements universal and absolute application. It is, however, settled law, universally applied, that general statements found in an opinion are to be read in the light of the facts of the case which the court was then con-

sidering. See *Lindblom v. Employers Liability Assurance Corporation, 88 Mont. 488, 499; 295 Pac. 1007, 1010; Farbo v. School District #1, 95 Mont. 531, 538, 539; 28 P.2d 455, 457.*

2. The Colbrese decision does not involve any question of general public importance.

It is inconceivable that the facts which occurred in the *Colbrese* case, as we have outlined them above, could occur again.

The *Colbrese* decision does not affect in the slightest degree the administration of the Montana statutes with respect to the registration of motor vehicles or the ministerial duties involved therein.

3. The petitioner seeks to go outside the Colbrese record to fault the Ninth Circuit Court of Appeals.

The material contained in Appendix B, pp. 38-54, inclusive, in the petition in this case is not a part of any record in the *Colbrese* case. It is certainly not a part of the record before the Ninth Circuit Court of Appeals at any time before it made its decision.

We submit that the Circuit Court of Appeals, in determining Montana law, is entitled to rely upon the reported opinions of the Montana Supreme Court, and upon the law and the facts as they are contained in those opinions. It is not required to go outside of the reported opinions, or the record in the cause which it is considering, to make its decison.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN M. SCHILTZ
403 Electric Building
Billings, Montana

JOHN C. SHEEHY
403 Electric Building
Billings, Montana
Attorneys for Respondent

Of Counsel:

GEORGE J. HUTTON
403 Electric Building
Billings, Montana

January, 1967.

No. 1073

FEB 17 1967

JOHN F. DAVIS, CLERK

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Respondent.

Supplemental or Reply Brief of Petitioner

CALE CROWLEY
Billings, Montana
Attorney for Petitioner

Of Counsel:

CROWLEY, KILBOURNE, HAUGHEY, HANSON & GALLAGHER
Billings, Montana

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LAURENCE COLBRESE, JR.,

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NATIONAL FARMERS UNION PROPERTY AND CASUALTY COMPANY,

Respondent.

Supplemental or Reply Brief of Petitioner

The sole legal issue is whether or not the opinion of the Ninth Circuit Court reported below at *368 F.2d 405* is in conflict with the prior controlling decision of the Montana Supreme Court in *Safeco Insurance Company v. Northwestern Mutual Insurance Company, 1963, 382 P.2d 174, 142 Mont. 155,* interpreting *Section 53-109, R.C.M. 1947.*

SUBSEQUENT LITIGATION IN STATE DISTRICT COURT IN YELLOWSTONE COUNTY, MONTANA, BETWEEN SAME PARTIES, INVOLVING SAME IDENTICAL FACTS, LEGAL ISSUES, AND SAME INSURANCE CONTRACTS.

Attached to this supplemental brief as Appendix C is a copy of the complaint *(Appendix C, pp. 1-4)*, the answer *(Appendix C, pp. 5-8)*, the pretrial order *(Appendix C, pp. 9-19)*, a stipulation *(Appendix C, 20-22)*, the motion for summary judgment *(Appendix C, p. 23)*, and the order and memorandum of the State District Judge for the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone *(Appendix C, pp. 24-25)*. This was a separate action in the State District Court between the same parties, involving a separate facet of coverage from the liability coverage that was involved in the opinion below of the Ninth Circuit Court. Otherwise the issues and facts are identical. It will be noted that the same basic legal issues are involved *(Appendix C, pp. 9-19)*; that all facts are identical, and that there was furnished to the State District Judge the opinion of the Ninth Circuit Court, below, as well as the findings of fact, conclusions of law and discussion by District Judge Jameson in the action below *(Appendix C, p. 21)*. The Montana State District Judge refused to adopt the conclusions reached by the Ninth Circuit Court, and held that irrespective of of other considerations which would ordinarily determine

the issue of ownership of a motor vehicle, the requirements of *Section 53-109(d), R.C.M. 1947* for transfer of motor vehicles are conclusive:

> "in view of the explicit holding of the Montana Supreme Court",

citing the holding of the Montana Supreme Court in the *Safeco* case *(Appendix C, pp. 24-25)*.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The findings of fact controlling this case are found at pages 2-10 of Appendix A, Petition for Writ. In an effort to ascertain the basis of the *Safeco* opinion, United States District Judge W. J. Jameson procured from the Montana Supreme Court all of the appellate briefs which had been submitted to and considered by the Montana court in that *Safeco* case *(227 F. Supp. 978 at 981)*. Despite many fact differences between the two cases, he found the two cases identical with regard to the controlling fact required by *Section 53-109, R.C.M. 1947*, as a condition precedent to validity of transfer of ownership of a motor vehicle for any purpose. In neither this case nor the *Safeco* case did they transfer or execute the certificate of title over to the transferee, nor deliver it to the transferee, nor endorse it for any purpose, nor was any new certificate of title ever issued by the Registrar of Motor Vehicles. Under *Section 53-109(d)* as interpreted in the *Safeco case*, the intended transfer was void for any purpose from its inception *(227 F. Supp. at 981-*

982). Petitioner has set out the five controlling facts in which petitioner believes that the facts of *Safeco* are identical with the facts of this case *(Petition for Writ, page 16).* Judge Jameson weighed the statements by the Montana Supreme Court in its reported opinion in light of the arguments and authorities which had been submitted to the Montana court in the appellate briefs, and, from that comparison, had a clear, clean-cut picture of the Montana law applicable to the undisputed facts of this case. Petitioner has now submitted to this court in Appendix B of the Petition for Writ filed in ths case the meat and substance of those arguments and authorities that were submitted to the Montana Supreme Court in the appellate briefs in *Safeco,* and which were studied by District Judge Jameson in this case. We are sorry that the Ninth Circuit Court did not have the benfit of the same material. We think it will enlighten this Court to have it.

Respondent criticizes examination of the appellate briefs submitted to the Montana Supreme Court in *Safeco* to ascertain the basis of the Montana law applicable to the undisputed and controlling facts of this case. The veracity of the material in Appendix B is not challenged by respondent, nor the conclusions to be drawn therefrom, and respondent simply urges that the lower courts are not required to go outside the reported opinions and examine material outside of those opinions in order to

ascertain the scope and extent of the Montana law applicable under the facts of this case. This Court has stated on numerous occasions that it is the duty of the federal appellate courts as well as the trial courts to *ascertain and apply* the state law where it controls the decision.

Huddleston v. Dwyer, 322 U.S. 232, 88 L. Ed. 1246, 64 S. Ct. 1015;

Meredith v. City of Winter Haven, 320 U.S. 228, 88 L. Ed. 9, 64 S. Ct. 7;

Fidelity Union Trust Company v. Field, 311 U.S. 169, 85 L. Ed. 109, 61 S. Ct. 176;

West v. American Telephone & Telegraph Company, 311 U.S. 223, 61 S. Ct. 179, 85 L. Ed. 139.

The Ninth Circuit Court itself said in *Summers v. Wallace Hospital, 1960, 9th C.C., 276 F. 2d 831:*

> "* * * As stated in West v. American Telephone & Telegraph Co., 311 U.S. 223, 237, 61 S. Ct. 179, 85 L. Ed. 139, *it is our duty to ascertain from all available data* what the state law is and apply it rather than to prescribe a different rule, however superior such rule may appear from the viewpoint of 'general law'. Whatever sources and processes the courts of Idaho would examine or employ in deciding this question in the first instance ought to be examined and employed by us here."
>
> *(P. 833; Emphasis supplied.)*

Petitioner cannot conceive of a more logical source of available data to procure and examine in an effort to ascertain the legal basis of a reported opinion of a state supreme court than the appellate briefs that were submitted to and considered by that court. Petitioner suggests that it was not only proper for District Judge Jame-

son to procure and study and weigh the appellate briefs that had been submitted to the Montana Supreme Court in *Safeco*, but that in order to examine all available data, and in order to ascertain and apply the correct Montana law to the fact situation in this case, he was compelled to do so. We think that the Ninth Circuit Court should have done so. We think that when this Court has done so, the comparison between the arguments and authorities that were submitted in appellate briefs to the Montana Supreme Court in *Safeco*, and the statements subsequently made by the Montana Supreme Court in its decision in answer to those arguments, will reveal the basis of the Montana law applicable to the undisputed facts in this case in its true perspective. It is manifestly clear from such examination and comparison that there is a direct conflict on the same controlling facts between the opinion of the Ninth Circuit Court reported below, and the prior controlling decision of the Montana Supreme Court in *Safeco*.

Respondent likewise places great emphasis on dicta in an early opinion of United States District Judge Charles N. Pray in *Fireman's Insurance Company of Newark, New Jersey v. Show, 1953, D.C. Mont., 110 F. Supp. 523*, decided ten years before the opinion of the Montana Supreme Court in *Safeco*. Respondent criticizes petitioner for not citing and discussing that early decision in our petition in this case. The most cogent argument for not doing so is set forth clearly and suc-

cinctly in the original opinion in this case by District Judge Jameson *(227 F. Supp. 978 at 981)*, which states:

> "Defendant argues that the opinion of Judge Pray in Fireman's Ins. Co. of Newark, N.J. v. Show, 1953, D. Mont., 110 F. Supp. 523, is 'most persuasive' in determining the effect of section 53-109(d). In their pretrial memorandum counsel recognized that Safeco Insurance Co. is in 'apparent conflict with Judge Pray's decision'; but in their brief in support of defendant's motion for summary judgment, it is contended that the conflict is only on the face of the decisions and that 'an examination of the rationale behind the decisions does not really involve any conflict.'
>
> "Respondent in Safeco likewise relied upon Judge Pray's opinion, and it was discussed in the briefs of both counsel in that case. Yet no reference was made to this case in the opinion of the Montana court in Safeco. In the absence of a subsequent construction of the statute by the Montana Supreme Court, I might properly follow Judge Pray's decision. I am of course now bound by the construction of the Montana Court in Safeco, unless it is determined that Safeco does not govern the situation here."
>
> *(P. 981.)*

We respectfully submit that examination of the arguments and authorities submitted to the Montana Supreme Court in the appellate briefs in *Safeco* is proper, that the disposition of those arguments by the Montana Court in its reported opinion affords a clean-cut picture of the correct Montana law applicable in this case, and a comparison with the Ninth Circuit Court opinion reported below reveals an irreconcilable conflict between the two opinions.

Respectfully submitted,

CALE CROWLEY
P. O. Box 2529
Billings, Montana 59103
Attorney for Petitioner

OF COUNSEL:

CROWLEY, KILBOURNE, HAUGHEY,
HANSON & GALLAGHER
Billings, Montana

IN THE DISTRICT COURT OF THE
THIRTEENTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA IN AND FOR
THE COUNTY OF YELLOWSTONE

LAURENCE COLBRESE, JR.,

Plaintiff,

-vs-

No. 41476

NATIONAL FARMERS UNION
PROPERTY AND CASUALTY
COMPANY,

Defendant.

APPENDIX

Complaint filed April 10, 1963.

Plaintiff, for cause of action, alleges:

I.

That Duaine Colbrese, deceased, was a child, who at the time of his death on December 3, 1960, was 16 years of age; that plaintiff is the father of said Duaine Colbrese, deceased.

II.

That on December 3, 1960, at about 8:00 o'clock A.M., of said day, Duaine Colbrese was riding as a passenger in a 1949 Ford two-door sedan, motor and serial No. 69672, driven by defendant, Jerry Kinney, the son of Albert Kinney, upon and along U. S. Highway 10S,

Respectfully submitted,

GALE CROWLEY
P. O. Box 2529
Billings, Montana 59103
Attorney for Petitioner

F COUNSEL:

ROWLEY, KILBOURNE, HAUGHEY
ANSON & GALLAGHER
Billings, Montana

APPENDIX

APPENDIX C

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

LAURENCE COLBRESE, JR., Plaintiff, -vs- NATIONAL FARMERS UNION PROPERTY AND CASUALTY COMPANY, Defendant.	)	No. 41476

Complaint filed April 10, 1963.

Plaintiff, for cause of action, alleges:

I.

That Duaine Colbrese, deceased, was a child, who at the time of his death on December 3, 1960, was 16 years of age; that plaintiff is the father of said Duaine Colbrese, deceased.

II.

That on December 3, 1960, at about 8:00 o'clock A.M., of said day, Duaine Colbrese was riding as a passenger in a 1949 Ford two-door sedan, motor and serial No. 69672, driven by defendant, Jerry Kinney, the son of Albert Kinney, upon and along U. S. Highway #10,

a public highway running generally in an east-west direction across the State of Montana, at a point on such highway approximately 1 mile east of the town of Reed Point, Montana, whereat the said Jerry Kinney operated, managed and controlled the automobile in such a manner that it skidded on ice then and there existing, left the highway, upset and thereby caused injuries to the person of Duaine Colbrese which resulted in his death.

III.

That at all times involved herein, said 1949 Ford two-door sedan, motor and serial No. 69672, was not owned by Jerry Kinney or by Albert Kinney but was owned by the devisee of or by the administratrix with the will annexed of Charles W. Ehart, deceased, and was not regularly furnished for the use of Jerry Kinney, son of Albert Kinney.

IV.

That plaintiff was forced to incur funeral, casket, and cemetery expenses, because of the death of Duaine Colbrese, in the sum of Eight Hundred Fifty and no/100 ($850.00) Dollars.

V.

That at all times mentioned herein, there was in full force and effect a certain policy of automobile liability insurance numbered A24-107,394 issued by defendant National Farmers Union Property and Casualty Co. to Albert Kinney on a 1951 Dodge vehicle, providing under "Coverage F" of said policy, as follows:

"COVERAGE F — Medical Payments
"To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including eye glasses and prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services:

"DIVISION 1. To or for the named insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' caused by accident, while occupying or through being struck by an automobile;

"DIVISION 2. To or for any other person who sustains bodily injury, caused by accident, while occupying:

"(a) the owned automobile, while being used by the named insured, by any resident of the same household or by any other person with the permission of the named insured; or

"(b) a non-owned automobile, if the bodily injury results from (1) its operation or occupancy by the named insured or its operation on his behalf by his private chauffeur or domestic servant or (2) its operation or occupancy by a relative and it is a private passenger automobile or trailer not regularly furnished for the use of such relative."

VI.

That by virtue of said "Coverage F", defendant owes plaintiff the sum of Eight Hundred Fifty and no/100 Dollars ($850.00), none of which has been paid.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of $850.00, for his costs of suit and for such other and further relief as to the Court seems proper.

LAMEY, CROWLEY, KILBOURNE,
HAUGHEY & HANSON

By LOUIS R. MOORE
Attorneys for Plaintiff

STATE OF MONTANA)
) ss.
County of Yellowstone)

LAURENCE COLBRESE, JR., being first duly sworn, deposes and says:

That he is the plaintiff named in the above entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge, except as to those matters stated on information and belief, and as to those he believes them to be true.

LAURENCE COLBRESE, JR.

Subscribed and sworn to before me this 9th day of April, 1963.

LOUIS R. MOORE
Notary Public for State of Montana.
Residing at Billings, Montana.
My commission expires June 24, 1963.

(NOTARIAL SEAL)

Answer and Demand for Jury Trial filed September 25, 1963.

FIRST DEFENSE

1. The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

2. Defendant answers plaintiff's complaint as follows:

3. Admits the allegations of Paragraph II of the complaint.

4. Denies the allegations of Paragraph III of the complaint.

5. Defendant is without knowledge or information upon which to form a belief as to the truth of the allegations of Paragraph IV of the complaint.

6. Admits the allegations of Paragraph V; allege that said policy of insurance further provided,

"EXCLUSIONS

This policy does not apply under (medical payments coverage) to bodily injury:

* * *

(c) To any person other than the named insured or relative, resulting from use of (1) a non-owned automobile in the automobile business or as a public or livery conveyance, or (2) a non-owned automobile in any other business or occupation except operation or occupancy of a private passenger automobile by the named insured or by his private chauffeur or domestic servant, or of a trailer used therewith."

7. Denies the allegations of Paragraph VI of the complaint.

8. Denies generally each and every other allegation in said complaint contained not hereinbefore specifically admitted, qualified or denied.

THIRD DEFENSE

9. On or about September 2, 1958, and at all times subsequent thereto to December 3, 1960, Albert Kinney represented to defendant, in writing, and otherwise, that he was the owner of the said 1949 2 Door Ford Sedan described in paragraph III of the complaint; when defendant issued policy No. A24-107,394, described in paragraph V of the complaint, it did so with the understanding and representation from Albert Kinney that he was the owner of said 1949 Ford automobile; that at all times said 1949 Ford automobile was in the possession of Albert Kinney, subject to his control; that defendant under its underwriting rules, would not have issued its policy of insurance described in paragraph V of the complaint, if in fact the said Albert Kinney was not the owner thereof, or had not represented himself to be the owner thereof, particularly on December 3, 1960.

FOURTH DEFENSE

10. That on September 2, 1958, and at all times subsequent thereto, to and including December 3, 1960, Albert Kinney represented to the defendant that he was the owner of said automobile, in writing and otherwise; plaintiff claims herein under and by virtue of the rights of Albert Kinney under said policy; Albert Kinney and

plaintiff waived any rights to claim against the defendant under said policy arising out of the use of the said 1949 Ford automobile on December 3, 1960, and are estopped from claiming against this defendant on the ground that Albert Kinney was not the owner of said 1949 Ford automobile.

FIFTH DEFENSE

11. The amount of money prayed for in this suit is for funeral, casket and cemetery expenses incurred because of the death of Duaine Colbrese; said expenses were the subject of a suit brought by plaintiff against Jerry Kinney in Cause No. 3650, in the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Stillwater; judgment for the sum of $18,850.00, including the sum of $850 for such funeral, casket and cemetery expenses was entered in favor of the plaintiff and against defendant Jerry Kinney, through his guardian Albert Kinney, in said cause; said judgment has been satisfied of record.

SIXTH DEFENSE

12. The sum of $850, representing expenses for funeral, casket and cemetery bills incurred by plaintiff as alleged in the complaint is the subject of a suit now pending in Civil No. 438, in the District Court of the United States, for the District of Montana, Billings Division, between these same parties.

WHEREFORE, defendant prays that plaintiff take

nothing by his complaint herein and that it be given costs of suit and such other and further relief as may be meet in the premises.

DEMAND FOR JURY TRIAL

Defendant demands a jury trial in the above entitled action.

WIGGENHORN, HUTTON,
SCHILTZ & SHEEHY

By JOHN C. SHEEHY
403 Electric Building
Billings, Montana
Attorneys for Defendant

Service of the within and foregoing Answer and Demand for jury trial and receipt of true copy thereof, made and admitted this 25th day of September, 1963.

LAMEY, CROWLEY, KILBOURNE,
HAUGHEY & HANSON

By LOUIS R. MOORE
Attorneys for Plaintiff

Pretrial Order filed November 14, 1963.

Pursuant to Rule 16 of the Montana Rules of Civil Procedure, a pretrial conference was held in the above entitled cause on the 8th day of November, 1963, at 10:00 o'clock A.M. Louis R. Moore of the firm of Lamey, Crowley, Kilbourne, Haughey, & Hanson, Billings. Montana, representing the plaintiff. John C. Sheehy of the law firm of Wiggenhorn, Hutton, Schiltz & Sheehy, Billings, Montana, representing the defendant.

AGREED FACTS

The following facts are admitted, agreed to be true, and require no proof:

1. That Duaine Colbrese, deceased, was a child, who at the time of his death on December 3, 1960, was 16 years of age; that plaintiff is the father of said Duaine Colbrese, deceased.

2. That on December 3, 1960, at about 8:00 o'clock A.M. of said day, Duaine Colbrese was riding as a passenger in a 1949 Ford two-door sedan, motor and serial No. 69672, driven by one Jerry Kinney, the son of Albert Kinney, upon and along U. S. Highway #10, a public highway running generally in an east-west direction across the State of Montana, at a point on such highway approximately 1 mile east of the town of Reed Point, Montana, whereat the said Jerry Kinney operated, managed and controlled the automobile in such a manner that it skidded on ice then and there existing, left the

highway, upset and thereby caused injuries to the person of Duaine Colbrese which resulted in his death.

3. That plaintiff was forced to incur funeral, casket, and cemetery expenses, because of the death of Duaine Colbrese, in the sum of Eight Hundred Fifty and no/100 ($850.00) Dollars.

4. That at all times mentioned herein, there was in full force and effect a certain policy of automobile liability insurance numbered A24-107,394, issued by defendant National Farmers Union Property and Casualty Co. to Albert Kinney on a 1951 Dodge vehicle, providin under "Coverage F" of said policy, as follows:

> "COVERAGE F — Medical Payments
> "To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including eye glasses and prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services:
>
> "DIVISION 1. To or for the named insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' caused by accident, while occupying or through being struck by an automobile;
>
> "DIVISION 2. To or for any other person who sustains bodily injury, caused by accident, while occupying:
>
> "(a) the owned automobile, while being used by the named insured, by any resident of the same household or by any other person with the permission of the named insured; or
>
> "(b) a non-owned automobile, if the bodily injury results from (1) its operation or occupancy by the

named insured or its operation on his behalf by his private chauffeur or domestic servant or (2) its operation or occupancy by a relative and it is a private passenger automobile or trailer not regularly furnished for the use of such relative."

5. That Albert Kinney obtained a policy of insurance from defendant, numbered A24-157,138, covering the 1949 Ford two door sedan described in Paragraph IV of the complaint; that said policy of insurance was in effect from September 2, 1958, to September 2, 1960, and lapsed for non-payment of premium on September 2, 1960.

6. That title to the 1949 Ford two door sedan, motor No. 69 672, was, at all times pertinent to this action, and still is, registered in the name of C. W. Ehart.

PLAINTIFF'S CONTENTIONS

Plaintiff's contentions are as follows:

1. That defendant is liable to plaintiff under the insurance contract numbered A24-107,394, quoted in part above, under Division 2(b)(2), thereof, because its operation was by a relative of the insured, it was a private passenger automobile, and was not regularly furnished for the use of such relative.

DEFENDANT'S CONTENTIONS

Defendant's contentions are as follows:

1. That the 1949 Ford two door sedan was owned by Albert Kinney on the date of the accident.

2. That even if the Ford automobile was not owned

by Kinney on the date of the accident, it was regularly furnished for the use of Jerry Kinney, the son of Albert Kinney.

3. That on or about September 2, 1958, and at all times subsequent thereto to December 3, 1960, Albert Kinney represented to defendant, in writing and otherwise, that he was the owner of the said 1949 2 Door Ford Sedan described in paragraph III of the complaint; when defendant issued policy No. A24-107,394, described in paragraph V of the complaint, it did so with the understanding and representation from Albert Kinney that he was the owner of said 1949 Ford automobile; that at all times said 1949 Ford automobile was in the possession of Albert Kinney, subject to his control; that defendant under its underwriting rules, would not have issued its policy of insurance described in paragraph V of the complant, if in fact the said Albert Kinney was not the owner thereof, or had not represented himself to be the owner thereof, particularly on December 3, 1960.

4. That on September 2, 1958, and at all times subsequent thereto, to and including December 3, 1960, Albert Kinney represented to the defendant that he was the owner of said automobile, in writing and otherwise; plaintiff claims herein under and by virtue of the rights of Albert Kinney under said policy; Albert Kinney and plaintiff waive any rights to claim against the defendant under said policy arising out of the use of the said 1949

Ford automobile on December 3, 1960, and are estopped from claiming against this defendant on the ground that Albert Kinney was not the owner of said 1949 Ford automobile.

5. The amount of money prayed for in this suit is for funeral, casket and cemetery expenses incurred because of the death of Duaine Colbrese; said expenses were the subject of a suit brought by plaintiff against Jerry Kinney in Cause No. 3650, in the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Stillwater; judgment for the sum of $18,850.00, including the sum of $850.00 for such funeral, casket and cemetery expenses was entered in favor of the plaintiff and against defendant Jerry Kinney, through his guardian Albert Kinney, in said cause; said judgment has been satisfied of record.

6. The sum of $850, representing expenses for funeral, casket and cemetery bills incurred by plaintiff as alleged in the complaint is the subject of a suit now pending in Civil No. 438, in the District Court of the United States, for the District of Montana, Billings Division, between these same parties.

ISSUES OF FACT

The following issues of fact, and no others, remain to be litigated upon the trial.

I.

Whether the 1949 Ford 2-door sedan was regularly furnished for the use of Jerry Kinney.

II.

Whether Albert Kinney represented that he was the owner of the 1949 Ford 2-door sedan when making application to defendant for insurance thereon.

III.

Whether defendant issued insurance policy No. A24-107,394 with the understanding and representation from Albert Kinney that he was the owner of the 1949 Ford 2-door sedan involved in the accident.

IV.

Whether the 1949 Ford 2-door sedan involved in the accident was at all times in the possession of Albert Kinney and under his control.

V.

Whether defendant, under its underwriting rules, would not have issued its policy of insurance numbered A24-107,394 if in fact Albert Kinney was not the owner of the 1949 Ford 2-door sedan, or had not represented himself to be the owner thereof, particularly on December 3, 1960.

VI.

Whether, on September 2, 1958, and at all times subsequent thereto, to and including December 3, 1960, Albert Kinney represented to the defendant that he was

the owner of said 1949 Ford 2-door sedan, in writing and otherwise.

VII.

Whether the judgment entered in Civil Action #3650, in the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Stillwater, in the amount of $18,850.00, included the sum of $850.00 for funeral, casket and cemetery expenses.

VIII.

Whether the sum of $850.00, representing expenses for funeral, casket and cemetery bills incurred by plaintiff is the subject of the suit now pending in Civil No. 438, in the District Court of the United States, for the District of Montana, Billings Division, between these same parties.

ISSUES OF LAW

The following issues of law, and no others, remain to be litigated upon the trial:

I.

Who owned the 1949 Ford 2-door sedan involved in the accident on December 3, 1960.

II.

Was the 1949 Ford 2-door sedan involved in the accident a "non-owned" automobile under the terms of insurance policy No. A24-107,394 on December 3, 1960.

III.

Do the allegations of defendant's third defense constitute a legal defense to the complaint.

IV.

Do waiver and estoppel, as alleged in defendant's fourth defense, bar plaintiff in this action.

V.

Does the satisfaction of the judgment entered in the Stillwater County case bar plaintiff in this action.

VI.

Does the pendency of Civil Action No. 438, in the District Court of the United States, between these same parties, constitute a bar to this action.

AMENDMENTS TO PLEADINGS

The Court granted, without objection, defendant's motion to amend its answer, on line 12 of page 3 thereof, to delete the words "fully paid and".

ADDITIONAL PRETRIAL DISCOVERY

Defendant will furnish a copy of the application for insurance on policy No. A24-107,394.

STIPULATIONS

I.

The parties stipulate that the exhibit attached hereto as being the insurance policy, shall be considered as the insurance policy in effect on December 3, 1960, even though the policy period noted on the "Declarations" page thereof does not cover such date.

II.

The parties stipulate that the copies of the matters and things taken from the probate file in the estate of

C. W. Ehart (Probate No. 10181) constitute all essential matters and things from said file, and nothing has been filed in connection with the said probate since the inventory and appraisement attached hereto as an exhibit.

III.

It is stipulated and agreed by the parties that the allegations of defendant's Fifth Defense are true and in connection therewith it is also stipulated that the said Stillwater County action was not defended by defendant on behalf of Jerry Kinney; that defendant did not pay the judgment entered and that the judgment was satisfied by an "Acknowledgment of Satisfaction of Judgment" attached hereto as an exhibit.

DETERMINATION OF LEGAL QUESTIONS IN ADVANCE OF TRIAL

It was agreed that the following legal issues should be determined by the Court in advance of trial, and that each party may file one brief, which brief must be filed by Thursday, November 14, 1963.

1. Does the "Fifth Defense" on page 3 of defendant's answer constitute a defense to plaintiff's claim?

EXHIBITS

The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto, are as follows:

1. The insurance policy.
2. The funeral bill.

3. The contents of the C. W. Ehart probate file.

4. The application dated September 2, 1958, by Albert Kinney, for insurance on the 1949 Ford 2-door sedan.

5. The application for insurance which resulted in Policy No. A24-107,394.

The above exhibits will be admitted in the form attached hereto, and without objection, foundation or proof.

The following exhibits will be admitted in evidence without foundation, and in the form attached hereto, but subject to all other objectons as to relevancy, etc:

1. The complaint in Civil Action No. 438, U.S. District Court for the State of Montana, Billings Division.

2. Acknowledgment of satisfaction of the judgment in Civil Action No. 3650 in the State of Montana, in and for the County of Stillwater.

EXCHANGE OF EXHIBITS

None.

TRIAL

It is estimated that the case will require two days for trial.

The case will be tried before the court with a jury.

IT IS HEREBY ORDERED that this pre-trial order shall supersede the pleadings and govern the course of the trial of this case, unless modified to prevent manifest injustice.

IT IS HEREBY ORDERED that all pleadings herein shall be amended to conform to this pre-trial order.

Dated this 14th day of November, 1963.

E. E. FENTON
District Judge

Approved as to form and content:

LOUIS R. MOORE
Attorney for Plaintiff

JOHN C. SHEEHY
Attorney for Defendant

Stipulation filed December 9, 1966.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the following facts are admitted, agreed to be true, and will require no proof at the trial of this cause:

1. Paragraphs I, II, IV and V of the complaint.

2. That on and prior to December 3, 1960, there were in full force and effect certain policies of automobile liability insurance issue by defendant to Albert Kinney covering various vehicles owned by said Albert Kinney, to-wit:

(a) Policy A24-107, 394, covering a 1951 Dodge automobile;

(b) Policy A24-030,461 covering a 1954 International truck.

In addition, there were other policies issued by defendant to Albert Kinney and numbered A-061,819; A24-144,258 and 24R23,194, which covered vehicles unknown at this time to counsel.

3. That Albert Kinney obtained a policy of insurance from defendant, numbered A24-157,138, covering the 1949 Ford two-door sedan described in Paragraph III of the complaint; that said policy of insurance was in effect from September 2, 1958, to September 2, 1960, and lapsed for non-payment of premium on September 2, 1960.

IT IS FURTHER STIPULATED that plaintiff's admissions, as stated in the attached request therefor and answer thereto, which said admissions were filed in Civil Action #438 of the U. S. District Court for the District of Montana, Billings Division, are given and admitted in this action.

IT IS FURTHER STIPULATED that the Court shall be furnished with a copy of the decision of the NINTH CIRCUIT COURT OF APPEALS in the action entitled "National Farmers Union Property and Casualty Company vs. Laurence Colbrese, Jr.", being Cause #20,550 in such Court, and further that the Court shall be furnished with a copy of the Findings of Fact, Conclusions of Law and Discussion thereof by Judge Jameson in Civil Action #438.

IT IS FURTHER STIPULATED that the insurance policy attached to the pre-trial order herein shall be considered as being both Policy #A24-107,394 and policy #A24-030,461.

Dated this 7th day of December, 1966.

CROWLEY, KILBOURNE, HAUGHEY, HANSON & GALLAGHER

By LOUIS R. MOORE
A member of the firm
500 Electric Building
P. O. Box 2529
Billings, Montana
Attorneys for Plaintiff

WIGGENHORN, HUTTON,
SCHILTZ & SHEEHY

By JOHN C. SHEEHY
403 Electric Building
Billings, Montana
Attorneys for Defendant

Motion for Summary Judgment filed December 21, 1966.

COMES NOW the defendant named, under Rule 56 of the Montana Rules of Civil Procedure and moves the Court for a Summary Judgment in favor of the defendant as to the issue of liability of the defendant to the plaintiff in the above entitled cause.

THIS MOTION is made and based upon the pleadings, depositions, admissions and stipulations on file herein, and upon the ground that there is no genuine issue as to any material fact and that the moving party herein is entitled to judgment as a matter of law.

Dated this 20th day of December, 1966.

JOHN C. SHEEHY
Of Counsel for the Defendant,
National Farmers Union Property
and Casualty Company

DUE SERVICE ADMITTED this 20th day of December, 1966.

LOUIS R. MOORE
Of Counsel for the Plaintiff

Order and Memorandum filed February 1, 1967.

The defendant having heretofore filed its motion for summary judgment in favor of the defendant as to the issue of liability of the defendant to the plaintiff, and said motion having been submitted for decision on oral arguments and written briefs, and having been by the Court fully considered,

IT IS ORDERED, that said motion be, and it is hereby, denied.

Dated this 1st day of February, 1967.

E. E. FENTON
Judge

MEMORANDUM:

The issue here is whether the vehicle in question was or was not owned by Albert Kinney when Duaine Colbrese was fatally injured while riding as a passenger therein.

The controlling statute, Sec. 53-109(d) R.C.M. 1947, provides:

> "Until said registrar shall have issued a certificate of registration and certificate of ownership and statement as hereinbefore provided, delivery of any motor vehicle shall be deemed not to have been made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective for any purpose."

Irrespective of the other considerations which would ordinarily determine the issue of ownership, the bare fact

that the documents specified by Sec. 53-109(d) were not issued to Albert Kinney is conclusive in view of the explicit holding of the Montana Supreme Court, that,

> "We must adhere to the tenor of our formal interpretations that *the provisions of the motor vehicle code provide the exclusive method of accomplishing a valid sale and transfer of a motor vehicle.*" (Emphasis supplied.) (Safeco Ins. Co. v. Northwestern Mutual Ins. Co., 142 Mont. 155, at 164-5, 382 P.2d 174, at 179.)

E. E. FENTON
Judge

CC: Counsel of Record.